Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

PERCY DUPUIS,

Petitioner,

v.

DON SNELL BUICK, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Court's Opinion in *St. Mary's Honor Center v. Hicks* requires a showing of "pretext-plus" in an employment discrimination case as suggested by the Fifth, First and Tenth Circuits or whether a showing of pretext only may permit a factfinder to infer that unlawful discrimination occurred as determined by the Second, Third, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

2. Whether in the instant case, the prima facie case coupled with the employee's showing of pretext satisfied The Court's proof requirements in *St. Mary's Honor Center v. Hicks* for the purposes of defeating the employer's motion for summary judgment.

3. Whether in the absence of direct evidence of age discrimination, a victim of age discrimination could ever survive review in the Fifth Circuit with the "pretext-plus" requirement pronounced in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

A. Percy Dupuis, Petitioner

B. John E. Wall, Jr., Attorney for Petitioner

C. Don Snell Buick, Inc., Respondent

D. Jay C. Counts and Matt Holley, Littler, Mendelson, Fastiff & Tichy, Attorneys for Respondent.

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OPINIONS BELOW

Suit was premised on Petitioner's claims brought under the Age Discrimination in Employment Act ("ADEA") after he was terminated from Respondent's employ. The Respondent filed a motion for summary judgment as to all claims on November 24, 1993.

In an opinion dated January 31, 1994, the United States District Court for the Northern District of Texas, Dallas Division, Barefoot Sanders presiding, granted Respondent's motion for summary judgment. This unpublished opinion is printed here as Appendix B. The district court found that Petitioner had presented a prima

facie case of age discrimination and that Respondent had articulated a legitimate non-discriminatory reason for Petitioner's termination. The district court, however, found that Petitioner's summary judgment evidence failed to establish a genuine issue of material fact that age discrimination was a motivating factor for Petitioner's termination despite Petitioner's proof that the stated reason for his discharge was false.

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. On September 28, 1994, the Fifth Circuit affirmed the ruling of the district court. This unpublished Fifth Circuit opinion is printed here as Appendix A. The Fifth Circuit affirmed the district court stating that Respondent met its burden of articulating a non-discriminatory reason for termination, and that Petitioner failed to present summary judgment evidence that raised a genuine issue of material fact that a motivating factor for Petitioner's termination was unlawful age discrimination. In making this determination, the Fifth Circuit relied on its "pretext-plus" interpretation of *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), as set out in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993), and disregarded the evidence of pretext including Respondent's serious credibility problems.

JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on September 28, 1994. Jurisdiction is

invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Petitioner, Percy Dupuis ("Dupuis") began his employment with Respondent, Don Snell Buick, Inc. ("Snell") in approximately 1975. (V. 1, p. 96).[1] Dupuis was employed by Snell as the Service Manager for Don Snell Buick. (V. 1, p. 96). Dupuis was terminated from his employment at Snell on February 3, 1992. (V. 1, p. 96). Depending on the forum, Snell's alleged reasons for Dupuis' termination have been ever changing. (V. 1, pp. 97-98, 113; V. 2, pp. 48, 55).[2]

One version of Snell's alleged reasons for terminating Dupuis, involves an incident which allegedly took place on or about January 27, 1992. (V. 1, p. 98; V. 2, pp. 48, 54-55). At this time, Dupuis was working as the service manager at Don Snell Buick. (V. 1, p. 96). While Dupuis was working, Keith Black, the District Service Manager for the Buick Motor division of General Motors arrived at Don Snell Buick. (V. 1, p. 96). When Black arrived, Black was demanding that Dupuis provide him with a rental car for a customer who was having some work performed on the customer's car. (V. 1, p. 96). Such a task was not

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[1] "V. 1" refers to Volume 1 of the record on appeal in this case.

[2] "V. 2" refers to Volume 2 of the record on appeal in this case.

Dupuis' responsibility because Black himself was supposed to make arrangements with an outside agency for a rental car. (V. 1, p. 96). On that day, however, Black insisted and Dupuis agreed to provide the customer with a rent car. (V. 1, p. 96). Contrary to Black's affidavit, Dupuis did not throw the rent car keys to Black, but rather handed Black the keys. (V. 1, p. 96). Dupuis did not see Black for the rest of the day. (V. 1, pp. 96-97). Allegedly, Black later claimed that Dupuis had been drinking alcohol on this day.

At no time that day, did Black or any employee or representative of Don Snell Buick ask Dupuis if he had been drinking or was intoxicated while on the job. (V. 1, p. 97). At no time on January 27, 1992 did Dupuis drink any alcohol. (V. 1, p. 97). Dupuis did not report to work on January 27, 1992 under the influence of alcohol. (V. 1, p. 97). Likewise, Dupuis was not intoxicated on the job on January 27, 1992, nor was he driving a company vehicle while intoxicated on January 27, 1992. (V. 1, p. 97).

On February 3, 1992, Dupuis was terminated from his employment at Don Snell Buick by Jim Snell, the General Manager of Don Snell Buick. (V. 1, p. 97). At the time of termination, Jim Snell told Dupuis that he was being terminated because Dupuis was "unwilling to stop drinking" and "was having a loss in productivity". (V. 1, p. 97). In response, Dupuis informed Snell that he had not had a drink since the previous Sunday. (V. 1, p. 97). Also, Dupuis had not been drinking on the job on February 3, 1993, nor did he arrive for work under the influence of alcohol on February 3, 1992. (V. 1, p. 97).

Contrary to Snell's later claims, at no time during the termination meeting did Jim Snell mention Keith Black or an alleged complaint made by Keith Black that Dupuis had been drinking or was intoxicated on the job on Monday, January 27, 1992. (V. 1, pp. 97, 98; V. 2, pp. 48, 54-55). Likewise, Snell did not tell Dupuis that there had been complaints that he had been drinking or intoxicated during working hours made by any Don Snell Buick employee. (V. 1, p. 97). Also, contrary to another one of Snell's later positions, at no time during this meeting did Snell state that Dupuis had violated a company policy about drinking on the job, or about driving a company vehicle under the influence of alcohol. (V. 1, pp. 97, 113; V. 2, pp. 48, 55). Snell did not ask Dupuis during this meeting if he had been drinking or intoxicated during working hours on January 27, 1992. (V. 1, p. 97). During this meeting, Snell did not mention company vehicles, nor did he ask Dupuis if Dupuis had been driving a company vehicle while intoxicated. (V. 1, p. 97).

After Dupuis was terminated, he went to his office and was taking some personal belongings out of his desk, when he overheard a conversation between a group of Don Snell Buick employees standing just outside his office. (V. 1, p. 97). The employees were discussing Dupuis' termination and were saying that the dealership (Don Snell Buick) wanted to replace Dupuis with someone younger and someone who would work for less pay. (V. 1, p. 97). Although, Dupuis cannot positively state who all was present during this conversation, or who said what, the persons present in the department at that time were possibly: the body shop manager, Mike McCarley; the dispatcher, Johnny Kroseski; the make-

ready manager, Mike Taylor; and service advisors, Anthony Ashley, Carl Contreras, Jeff Hamlin, David Herring. (V. 1, p. 97).

After terminating Dupuis, Snell replaced him with Raney Young. (V. 1, p. 98). Young was approximately 34 years old at the time, and Dupuis was 60 years old at the time of his termination. (V. 1, p. 98). At the time of termination, Dupuis was earning approximately $101,000.00/year as the service manager. (V. 1, p. 98). Part of the reason Dupuis was so highly paid was because of his 17 year tenure with Snell. (V. 1, p. 98). Young was paid on a different pay scale than Dupuis and the percentage paid on his commissions was less than Dupuis'. (V. 1, p. 98).

On April 8, 1992, Dupuis attended a hearing for Appeal No. 92-122342-1-0492 regarding his termination which was held at the Texas Employment Commission Appeals office in Dallas, Texas. (V. 1, p. 98). At this hearing, Don Snell Buick was represented by Jim Snell, the General Manager and Jim Bush, the office manager. (V. 1, p. 98). The TEC appeal in question was brought after an initial finding that Dupuis had been discharged for misconduct. (V. 1, p. 98). After the hearing on appeal, the TEC found no misconduct. (V. 1, p. 98).

At the TEC hearing, Jim Snell stated that the reason Dupuis was terminated was: "Intoxicated on the job". (V. 1, p. 98). Jim Snell stated that this (being "intoxicated on the job") occurred on the Monday prior to Dupuis' termination February 3, 1992, i.e., January 27, 1992. (V. 1, p. 98). Then, for the first time, Jim Snell stated that he believed Dupuis was drinking or intoxicated on the job on January

27, 1992 based on a complaint allegedly made by Keith Black. (V. 1, p. 98). Specifically, Jim Snell stated: "He [Black] came to my office and said, I just can't deal with Percy. He's belligerent, abusive, and to be real honest with you, I think he was drunk. . . . So at that time I [Jim Snell] asked a number of other employees if that was the case, if on that particular Monday, Percy had been drinking or had been drunk and there was, everybody, I asked just kind of said yes that he had. . . . " (V. 1, p. 98).

At the TEC hearing, Jim Snell admitted that he did not see Dupuis drinking on January 27, 1992 or an any particular day immediately preceding the discharge. (V. 1, p. 98). Jim Snell admitted that Dupuis was not intoxicated on the day he was terminated. (V. 1, p. 98). Jim Snell also stated that he did not ask Dupuis at the time of termination if Dupuis had been intoxicated or drinking on the job on January 27, 1992. (V. 1, p. 98).

Contrary to Jim Snell's allegations, Jim Bush testified during the TEC hearing that he actually saw Dupuis on January 27, 1992, and that he could not say that Dupuis was intoxicated on that day. (V. 1, pp. 98-99). Furthermore, Bush testified that Dupuis was not stumbling or staggering and that Dupuis *did not* smell like alcohol on January 27, 1992. (V. 1, p. 99).

Snell's stated reasons for termination have consistently and materially changed despite the fact that each alteration of Snell's story has been made under oath. (V. 1, pp. 97-98, 113; V. 2, pp. 48, 55).

REASONS FOR GRANTING THE WRIT

1. Snell's ever changing "stated reason" for terminating Dupuis fails to satisfy the "legitimacy" requirement necessary for meeting the employer's burden of establishing a legitimate non-discriminatory reason for termination in an employment discrimination case.

In most instances, claims of employment discrimination involve a three-step proof analysis. First, a plaintiff must establish a prima facie case of discrimination. This is followed by the employer defendant's attempt to articulate a legitimate non-discriminatory reason for the challenged employment action. Finally, should the defendant be successful in its burden of production, the plaintiff is allowed to prove, directly or indirectly, that the explanation put forth by the defendant is a pretext for discrimination. *See, St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also, United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir. 1983), *cert. denied*, 460 U.S. 1026 (1984).

In this case, it is undisputed that Dupuis established a prima facie case of age discrimination.[3] Thus, the

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[3] To prove a prima facie case of age discrimination, a plaintiff must show the following: (1) he was discharged; (2) he was qualified for the job; (3) he was within the protected class at the time of the discharge; (4) he was replaced by someone outside the protected class, or (5) by someone younger or (6) show otherwise that his discharge was because of age. *Bienkowski v.*

burden shifts to Snell to produce evidence that the challenged adverse employment action has as its basis a legitimate, nondiscriminatory reason. *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802. As noted by The Court in *Texas Dep't of Community Affairs v. Burdine, supra,* the "burden" which shifts to a defendant once the presumption of discrimination is created is one of production of evidence:

> The defendant must *clearly* set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

450 U.S. at 254-55 (emphasis added). Apparently fearful that its holding would pose a somewhat meaningless hurdle to defendants, The Court warned that the burden cannot be met "merely through an answer to the complaint or by argument of counsel." *Id.* Indeed, The Court emphasized, the defendant's explanation, if both "legitimate and nondiscriminatory," also "must be clear and reasonably specific." *Id.* at 255. "Legitimacy" connotes more than a requirement that the asserted reason have some factual basis. It must be "reasonable" under the

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American Airlines, Inc., 851 F.2d 1503, 1505 (5th Cir. 1988), *citing Elliott v. Group Medical and Surgical Service*, 714 F.2d 556, 565 (5th Cir. 1983).

In the present case, the district court and the Fifth Circuit found that Dupuis presented a prima facie case of age discrimination. Indeed, the summary judgment evidence establishes a prima facie case, to-wit: Dupuis was terminated by Snell on February 3, 1992; Dupuis had been the service manager at Don Snell Buick for approximately 17 years and was qualified for the job; Dupuis, who was 60 years old at the time of termination, was a member of the protected class; and Dupuis was replaced by a younger worker, Raney Young, age 34. (V. 1, pp. 96, 98).

circumstances. *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792.

In its motion for summary judgment, Snell articulates two alleged reasons for terminating Dupuis. Specifically, Snell claims to have terminated Dupuis for: (1) violation of company policy prohibiting reporting to work under the influence of alcohol; and (2) a violation of company policy prohibiting operating a company vehicle while under the influence of alcohol. (V. 2, pp. 3, 48, 55). Although on their face these articulated reasons would appear to be legitimate non-discriminatory reasons for terminating an employee, Snell has failed to meet its burden of production. This is so because in light of Snell's repeated alteration of the "stated reason" for termination, Snell has failed to meet the requirements of setting forth an explanation which is clear and reasonably specific. Moreover, the reasons were unequivocally denied by Dupuis.

Specifically, the "stated reasons" in Snell's motion for summary judgment are not the same reasons given by Snell to Dupuis at the time of termination. (V. 1, pp. 97, 98; V. 2, pp. 3, 48, 55). In addition to differing from the "stated reason" given to Dupuis at termination, the "stated reasons" given in Snell's motion for summary judgment also differ from Snell's answers to interrogatories, which also differs from Snell's "stated reasons" given at the TEC hearing. (V. 1, pp. 97, 98, 113; V. 2, pp. 3, 48, 55). Nevertheless, the Fifth Circuit held that Snell met its burden of production because the "stated reasons" were consistent and mutually reinforcing. While noting the discrepancies in Snell's various "stated reasons" for

termination, the Fifth Circuit maintained that a reasonable factfinder could not conclude that the reasons set forth by Snell were conflicting. This holding was error. Snell has continued to alter and expand its "stated reasons" for terminating Dupuis; therefore, Snell has failed to meet its burden of producing a clear and specific reason for terminating Dupuis.

There is language in *St. Mary's* and *Bodenheimer* to suggest that the employer need only articulate a lawful reason for termination regardless of its persuasiveness.[4] If, however, Snell's method of formulating a customized "stated reason" for discharge for each forum wherein an explanation was requested were acceptable, then any employer accused of a discriminatory discharge could view a termination in hindsight and alter its "stated reason" for discharge to fit the particular need of the moment. Approval of such action defeats the requirement of producing a clear and specific reason for termination. Indeed, as apparently happened in the present case, approval of such action provides an employer with a means for almost guaranteed immunity from liability under the Fifth Circuit's "pretext plus" interpretation of *St. Mary's*.

The district court and the circuit court erred in holding that Snell articulated a legitimate nondiscriminatory reason for Dupuis' termination.

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[4] *St. Mary's, supra,* 113 S.Ct. at 2748; *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955, 958 (5th Cir. 1993).

2. When analyzing Dupuis' proof under its "pretext-plus" interpretation of *St. Mary's Honor Center v. Hicks*, the Fifth Circuit's reading of *St. Mary's* ended at 113 S.Ct. 2747.

Even if Snell has met its burden of production, summary judgment is not proper in this case because the summary judgment evidence establishes genuine issues of material fact regarding whether Snell's articulated reasons for termination are a pretext for age discrimination. This Court clearly reasoned that in a discrimination case, if the defendant meets its burden, the plaintiff must then be given the opportunity to show that the reason asserted is pretextual. *See, St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747-50 (1993). This Court stated in *St. Mary's* that "[t]he factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the prima facie case, *may* suffice to show intentional discrimination." (emphasis added) *Id.* This Court in *St. Mary's* further held that "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*.' " (emphasis in original) *Id.* at 2749.

In determining whether summary judgment was proper in this case, the district court and the Fifth Circuit relied on This Court's *St. Mary's* decision and subsequent Fifth Circuit decisions interpreting *St. Mary's*, *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993) and *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994). The holding in *St. Mary's*, however, does not

permit the district and circuit courts' flawed finding that summary judgment was proper in this case.

The *St. Mary's* decision clearly provides that unlawful discrimination may be inferred by the factfinder in cases where the articulated reason for termination has been disproved or rejected. *St. Mary's, supra,* 113 S.Ct. at 2747-50. In this case, Snell's repeated alterations of its "stated reason" for termination create a fact issue regarding whether this was the true reason for termination. Also, Dupuis clearly refuted the stated reason for discharge. Consequently, the factfinder upon rejecting the ever changing "stated reason" for termination could infer that Dupuis was terminated based on his age; therefore, summary judgment is not proper under *St. Mary's.*

Bodenheimer interprets *St. Mary's* to require a "pretext-plus" type showing;[5] however, this language cannot be reconciled with the holding in *St. Mary's* that a determination by the factfinder that the stated reason for termination is false is sufficient for the factfinder to infer intentional discrimination. *See, St. Mary's, supra,* 113 S.Ct. at 2749. In *Bodenheimer,* the Fifth Circuit states: "The Court in *St. Mary's* put the issue to bed. To ultimately prevail, the plaintiff must prove, through a preponderance of the evidence that the employer's stated reasons were not the true reason for the employment decision and that unlawful discrimination was." *St. Mary's,* ___ U.S. ___, 113 S.Ct. at 2427. *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d at 957. Surprisingly, the language

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[5] *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d at 957, 959.

attributed to This Court in *Bodenheimer* is nowhere to be found in The Court's *St. Mary's* Opinion at page 2747.

Nevertheless, the *Bodenheimer* opinion is alive and well in the Fifth Circuit and is acting to eliminate employment discrimination claims wherein the employee has only circumstantial evidence to support his discrimination claim. The Fifth Circuit has cited *Bodenheimer* as precedent for granting employer defendant's motions for summary judgment based on the "pretext-plus" interpretation of *St. Mary's* in published decisions such as: *Barrow v. S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994); *McCantel v. State of Louisiana, Dept. of Transportation and Development*, 37 F.3d 197 (5th Cir. 1994); and *Davis v. Chevron USA, Inc.*, 14 F.3d 1082 (5th Cir. 1994).

In the present case, the Fifth Circuit cited *Barrow* as authority upon which to affirm summary judgment and specifically referred to the following language: "To show that the defendants' proffered reason was a pretext for discrimination, however, [plaintiff] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for the defendants' action. *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d at 298. The Fifth Circuit also noted in its opinion in the present case that, according to *Bodenheimer*, evidence submitted by a plaintiff which only attacks the employer's stated reason for termination is incapable of addressing the employer's motive which is the central issue in an employment discrimination case. This reasoning ignores the reality that employers in an age discrimination case rarely admit to the employee that they are being terminated because of their age. This reasoning

further eliminates the factfinder's opportunity to determine whether the employers "stated reasons" are pure and legitimate or merely a pretext for discrimination. Regardless, relying on *Bodenheimer* and *Barrow*, the Fifth Circuit ignored the summary judgment evidence of Snell's credibility problems and determined that summary judgment was proper because the remainder of Dupuis' summary judgment evidence was not capable of addressing Snell's motive. The Fifth Circuit erred in reasoning that Snell's repeatedly altered "stated reason" for termination was not evidence of a discriminatory motive.

The *St. Mary's* decision clearly provides that unlawful discrimination may be inferred by the factfinder in cases where the articulated reason for termination has been *disproved* or rejected. *St. Mary's, supra,* 113 S.Ct. at 2747-50. (emphasis added). This Court in *St. Mary's* specifically rejected the "pretext-plus" approach which is now being implemented by the Fifth Circuit. *Id.* at 2749. *St. Mary's* held that a finding of discrimination is required for a plaintiff to prevail; and thereby, dispelled previous decisions which held that rejection of the employer's stated reason for termination automatically compelled judgment against the employer regardless of whether the factfinder believed the true reason for termination was discriminatory. *Id.* at 2747-50. Contrary to the Fifth Circuit's interpretation, however, under *St. Mary's*, an employee may prevail when a finding of discrimination occurs regardless of whether the finding was based on disbelief of the employer's stated reasons for discharge and/or other independent evidence of discrimination. *See, Id.* at 2749.

Thus, in accordance with *St. Mary's*, the factfinder upon determining that Snell's stated reasons for terminating Dupuis are false may infer that Dupuis was discriminated against because of his age, even in the absence of additional proof.

3. The Fifth Circuit needs to recognize the remainder of the *St. Mary's* Opinion, particularly the language found at 113 S.Ct. 2749, which the Second, Third, Fourth, Sixth, Seventh, Eighth and Ninth Circuits apparently follow.

Most of the other circuits have rejected the "pretext-plus" interpretation of *St. Mary's*.[6] *See, Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2nd Cir. 1994); *McKenna v. Pacific Rail Service*, 32 F.3d 820 (3rd Cir. 1994); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Manzer v. Diamond Shamrock Chemicals Company*, 29 F.3d 1078 (6th Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120 (7th Cir. 1994); *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

In *Anderson*, the Seventh Circuit held the following regarding the *St. Mary's* decision:

> It is clear that The Court rejected the "pretext-only" rule applied by the Eighth Circuit. While less clear, it appears that the Court adopted this

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[6] The First and Tenth Circuits appear to be in agreement with the Fifth Circuit's "pretext-plus" interpretation of *St. Mary's*. *See, Hoeppner v. Crotched Mountain Rehabilitation Center, Inc.*, 31 F.3d 9 (1st Cir. 1994); *Wolenski v. Manville Corporation*, 19 F.3d 34 (10th Cir. 1994).

> circuit's version of the "pretext-only" rule rather than the "pretext-plus" approach of the First Circuit.

Anderson v. Baxter Health Care Corp., 13 F.3d at 1123. In making this determination, the *Anderson* court recognized the language in *St. Mary's* which allows that:

> "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is *required*.' " (footnote omitted) (emphasis in original).

Id., citing, St. Mary's, 113 S.Ct. at 2749. The *Anderson* court further held that:

> Both *McDonnell Douglas* and *Hicks* speak to the burden the plaintiff bears at trial. However, for summary judgment purposes, the non-moving party . . . has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal.

Id. at 1124. The *Anderson* court also recognized that:

> If the only reason an employer offers firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind *McDonnell Douglas*. . . . The point is only

> that if the inference of improper motive *can* be drawn, there must be a trial.

Id. (emphasis in original).

In another post-*St. Mary's* decision, the Ninth Circuit reversed a summary judgment granted in favor of an employer in a race discrimination case, and stated:

> [I]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed.

Washington v. Garrett, 10 F.3d 1431, 1433 (9th Cir. 1993). The *Washington* court also reasoned that:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext, without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.

Id.

Clearly, "pretext-plus" is a stranger to The Court's *St. Mary's* Opinion. Nevertheless, the Fifth Circuit interprets *St. Mary's* to require a plaintiff to not only disprove or discredit the employer's stated reason for discharge but also requires additional proof of unlawful motive. As yet, the Fifth Circuit has not declared what the ever elusive form of evidence must be.

4. Absent direct evidence of age discrimination, a victim of age discrimination cannot defeat an employer's motion for summary judgment under the Fifth Circuit's "pretext-plus" interpretation of *St. Mary's*.

St. Mary's allows for a denial of summary judgment in cases such as the present case wherein there are genuine issues of material fact regarding whether the defendant's proffered reason for termination is true or merely a pretext.

Surprisingly, the Fifth Circuit has recognized that:

> In most employment discrimination cases, unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. . . . Employers are rarely so cooperative as to include a notation in the personnel file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job. . . .

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d at 638.

In most cases, the absence of direct evidence of age discrimination is almost inevitable, thus circumstantial evidence may suffice to establish liability for discrimination. The method of proof utilized in *St. Mary's, McDonnell Douglas, Burdine* and *Aikens, supra,* suffices to establish circumstantially that the employer's actions were motivated by *intentional* discrimination. This is so because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Service Bd. of Governors v. Aikens, supra,* 460 U.S. at 716;

accord, Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985). There is not now, nor has there ever been, any requirement that discriminatory animus be established by direct evidence, and it is reversible error to so require. *United States Postal Service Bd. of Governors v. Aikens, supra.*

A recognized manner of showing that the employer's stated reason for its action is a pretext is through the use of direct evidence of discriminatory animus, such as age-related remarks by the employer or the employer's representatives. *See, Normand v. Research Institute of America, Inc.*, 927 F.2d 857 (5th Cir. 1991); *Fowler v. Carrollton Public Library*, 799 F.2d 976, 984 (5th Cir. 1986). In this case, just moments after Dupuis was terminated, Dupuis heard Snell employees discussing Dupuis' termination and commenting that Dupuis was being terminated because of his age. (V. 1, p. 97). Specifically, the Snell employees commented that Snell wanted to get somebody younger to operate the service department. (V. 1, p. 97). Also, it was stated by the Snell employees that Snell could get someone younger and who would be cheaper to pay to perform Dupuis' job. (V. 1, p. 97). There were approximately six Snell representatives who were present during this conversation which took place just outside Dupuis' office on February 3, 1992, some of whom were in management. (V. 1, p. 97). The age-related comments were directly related to Dupuis' termination and are at least circumstantial evidence, if not direct evidence, of age discrimination. The district court and circuit court voiced concern that the age-based comments were made by unidentified non-decision makers (V. 1, p. 162); however, Dupuis identified the persons he believed to be

present. Also, regardless of whether these people made the decision to terminate Dupuis, the age-based conversation is highly probative of the management's understanding of the unlawful reasons for Dupuis' termination. Also, in an apparent attempt to discredit Dupuis' testimony regarding this age-related conversation, Snell presented affidavits of Mike McCarley and several other Snell representatives, wherein the affiants each deny being aware of or participating in any group conversation regarding Dupuis' age. (V. 2, pp. 13, 31, 33, 38, 41, 44, 61). The affidavit of Percy Dupuis directly contradicts the statements in each of these affidavits regarding the age-based conversation made on the day Dupuis was terminated. (V. 1, p. 97).

Summary judgment is not appropriate in a case wherein the material facts are sharply disputed. The Fifth Circuit in *Bienkowski v. American Airlines, Inc.* was faced with a situation practically identical to the present case in that the affidavits submitted by each party for use as summary judgment evidence were drastically different versions of the alleged facts. The *Bienkowski* court noted that a plaintiff's conclusory testimony of discrimination standing alone is typically not enough to raise a fact issue; however, they reversed the summary judgment order, and held that:

> questions of motivation are necessarily raised by the affidavits . . . [of the parties] whose renditions of their conversations and meetings with each other differ diametrically and vary specifically.

Bienkowski v. American Airlines, Inc., 851 F.2d at 1507. The *Bienkowski* court also stated that because of the obvious

credibility issues in the case, live testimony would be more effective than printed affidavits in making the necessary credibility decisions. *Id.* In the present case, as in *Bienkowski,* the events which occurred and their respective motivations are diametrically and specifically in dispute and would most effectively be resolved through live testimony. Snell's inconsistencies in this case are disturbing and raise serious credibility questions which should have been left for the jury to resolve. Summary judgment was not proper in this case.

More evidence of pretext is found in the numerous material alterations of Snell's "stated reason" for termination. Specifically, when Snell terminated Dupuis, Snell told Dupuis it was because he would not stop drinking and was having a loss in productivity. (V. 1, p. 97). As Snell's "stated reason" came under the scrutiny of the post-termination process, Snell began to significantly change and expand the "stated reason". At the Texas Employment Commission (TEC) hearing regarding Dupuis' termination, Jim Snell claimed that the reason Dupuis was terminated was because of a complaint by Keith Black that Dupuis was drinking on January 27, 1992. (V. 1, p. 98). Dupuis prevailed at the TEC. Obviously realizing its latest "stated reason" for termination had self destructed at the TEC, Snell was compelled to revamp its "stated reason" for terminating Dupuis when answering interrogatories. Specifically, Snell stated in answers to interrogatories that Dupuis was terminated for working under the influence of alcohol in violation of company policy. (V. 1, p. 113). Despite the fact that Snell's previously claimed "stated reasons" for termination were

made under oath, in Snell's motion for summary judgment, Snell presented sworn affidavits from Jim Snell and Don Snell which provided new and materially different "stated reasons" for termination. In their affidavits Jim Snell and Don Snell claim Dupuis was terminated for violating the company's policies prohibiting reporting to work under the influence of alcohol and operating a company vehicle under the influence of alcohol. (V. 2, pp. 48, 54).

Suspiciously, the *first* time the question of Dupuis allegedly driving a company car while intoxicated surfaced as a "stated reason" for termination was in Snell's summary judgment affidavits. (V. 1, pp. 97, 98, 113; V. 2, pp. 3, 48, 55).

Clearly, Snell's "stated reasons" for termination given at the time of termination, in Defendant's answers to interrogatories, at the Texas Employment Commission hearing and finally in the affidavits attached to its motion for summary judgment not only drastically differ from Dupuis' affidavit, but also drastically differ from one another. (V. 1, pp. 96-99, 113; V. 2, pp. 3, 48, 55).

Both the district court and the Fifth Circuit reconciled the existence of Snell's numerous and ever changing reasons for termination by claiming that the reasons were "consistent and mutually reinforcing". (V. 1, p. 161). The only thing consistent about Snell's proffered reasons for termination is the fact that the reasons have consistently changed from forum to forum, apparently irrespective of whether Snell was under oath. (V. 1, pp. 97, 98, 113; V. 2, pp. 3, 48, 55). The ever changing alleged reason for termination establishes material fact issues regarding Snell's

reasons for terminating Dupuis and whether the ever varying and expanding different "stated reasons" are pretextual. After all, Snell dared not actually admit that Dupuis' age was a factor in his termination, so they made up a reason and have been altering it ever since. If Snell's motives for terminating Dupuis were pure and legitimate, there would be no reason for Snell to continue to change its story.

None of the various "stated reasons" for discharge given at the TEC hearing, in answers to interrogatories, or in the affidavits supporting Snell's motion for summary judgment were the reasons given to Dupuis at the time of termination. The "stated reasons" for termination proffered by Snell in its motion are recent, ever-expanding fabrications and are clearly inconsistent with Snell's prior admissions made under oath. Thus, a fact issue exists regarding whether Snell's "stated reasons" for termination are a pretext. Also, as in *Bienkowski*, the credibility determinations necessary for the resolution of the sharply conflicting fact issues should be reserved for the factfinder to determine.

Even if Snell's various reasons for allegedly terminating Dupuis are considered worthy of some level of belief, there is no summary judgment evidence that establishes as a matter of law that Dupuis was drinking during the work day or had reported to work under the influence of alcohol on January 27, 1992. Dupuis denies that he was drinking on the job, was intoxicated on the job and/or reported to work under the influence of alcohol on January 27, 1992. (V. 1, p. 97). Furthermore, both Jim Snell and Don Snell admit that they never even saw Dupuis on January 27, 1992. (V. 1, p. 98; V. 2, pp. 48, 53). Jim Snell

never asked Dupuis if he had been drinking during working hours or reported to work under the influence of alcohol on January 27, 1992. (V. 1, p. 97; V. 2, p. 55). Also, Keith Black does not affirmatively state in his affidavit that Dupuis was drinking alcohol during the work day, or that Dupuis had reported to work under the influence of alcohol or that he had seen Dupuis drinking on that day. (V. 2, p. 15). Black merely states that Dupuis smelled of alcohol, was verbally abusive and confused about Black's presence at the dealership. (V. 2, p. 15). Black did not see Dupuis consuming alcohol on January 27, 1992, nor did Black ask Dupuis if he had been drinking. (V. 1, pp. 96-97; V. 2, p. 15). Jim Snell stated in his affidavit that Black reported to him only that Dupuis was abusive and appeared drunk. (V. 2, p. 54). Dupuis refuted these claims.

Although Snell also claims in his affidavit that he relied on information from other employees, i.e. Betty Davis and Jeff Hamlin, in allegedly determining that Dupuis was intoxicated on the job on January 27, 1992, there is still no evidence that Dupuis was in fact intoxicated on the job, and Dupuis denies this assertion. (V. 1, p. 97; V. 2, pp. 54-55). Neither Hamlin nor Davis state that they witnessed Dupuis drinking any alcohol on January 27, 1993. (V. 2, pp. 38, 41). More importantly, no one from Snell bothered to ask Dupuis whether or not he had been drinking or was intoxicated during working hours on January 27, 1992. (V. 1, pp. 97-98). In fact, in direct contrast to the statements of Black, Hamlin and Davis, Jim Bush (Snell's office manager) stated under oath at the TEC hearing that he personally observed Dupuis at work

on January 27, 1992 and that Dupuis *did not* appear intoxicated. (V. 1, pp. 98-99; V. 2, pp. 15, 38, 41). Also, this statement by Bush that he observed Dupuis on January 27, 1992 is in direct contrast with Jim Snell's statement in his affidavit that Bush had not seen Dupuis on the date in question. (V. 1, pp. 98-99; V. 2, p. 54). Apparently, when making his affidavit, Jim Snell forgot his office manager's previous sworn testimony that Dupuis *did not* appear intoxicated on January 27, 1992. Curiously, the Fifth Circuit stated that Dupuis' actions on January 27, 1992 were not relevant because it was Snell's motives that were in question. This reasoning is nonsensical because various versions of Snell's "stated reasons" relate directly to Dupuis' alleged behavior on January 27, 1992. Dupuis' summary judgment evidence contradicts Snell's claim that he was intoxicated on the date in question; therefore, summary judgment was not proper.

In an effort to bolster its most recent "stated reason" for terminating Dupuis, Snell filled its motion and supporting materials with allegations regarding Dupuis' drinking which are irrelevant and obviously designed to prejudice Dupuis. Snell attempts to divert attention from the events which allegedly occurred at the time of termination by bringing up alleged incidents concerning Dupuis' drinking which occurred either *after* he was terminated or which occurred nearly a year or longer prior to his termination. (V. 2, pp. 23-26, 31, 35, 38, 41-44, 46-48, 52-55, 57-59, 64, 97-104, 130-31, 134-39). Obviously, Dupuis' actions after his termination are not relevant as they could not have been a factor in Snell's decision to terminate Dupuis. Snell nevertheless appears to rely on these post-termination actions as a reason for terminating

Dupuis. (V. 2, pp. 5-6). The district court stated that the evidence relating to Dupuis' activities after he was terminated was irrelevant and stated that the evidence would not be considered. (V. 1, p. 144). Also, the approximately year old pre-January 27, 1992 incidents, which Snell now points to as a reason for termination, were not a factor in the decision to terminate Dupuis according to Snell's own admissions at the TEC hearing. (V. 1, p. 98). Thus, the behavior Dupuis may or may not have exhibited at any time other than on January 27, 1992 is not relevant to the pending action and does not provide a basis for summary judgment. Instead, Snell's after-the-fact attempt to use these alleged events raises questions about Snell's true motives for termination. Snell could not use age or performance as a reason for termination, thus it obviously chose to attack Dupuis with his history and post-termination downslide in his recovery process.

Clearly, Snell's various versions of the events leading up to Dupuis' termination and the stated reasons for termination are not clear or consistent. The summary judgment evidence does not establish as a matter of law that the now purported stated reasons for discharge are legitimate nondiscriminatory reasons, much less that they are not a pretext for age discrimination. Considering all of the variations and inconsistencies, the stated reasons are not worthy of belief. As discussed above, Snell has changed its "stated reason" for terminating Dupuis at least three times since February 3, 1992. Each of these times the Defendant was under oath. (V. 1, pp. 97-98, 113; V. 2, pp. 48, 55). Snell has serious credibility problems in this case. The Fifth Circuit has held that discrepancies in testimony raise credibility issues which are properly for

the factfinder to determine. *See, Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans*, 916 F.2d 300, 307 (5th Cir. 1990), *citing Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980). Indeed, the *Dibidale* court held that "credibility assessments are not fit grist for the summary judgment mill." *Id.* at 307. Nevertheless, the Fifth Circuit's post-*St. Mary's* decisions have been instrumental in firing up the summary judgment grist mill in summary judgment cases.

Dupuis' affidavit also sets forth additional evidence that he was terminated because of his age. (V. 1, pp. 96-99). Specifically, Snell terminated Dupuis, a 17-year employee, on or about February 3, 1992 allegedly for his "unwillingness to stop drinking" and "loss in productivity". (V. 1, pp. 96-97). Dupuis was then promptly replaced by a much younger employee, Raney Young, age 34. (V. 1, p. 98). At the time of termination, Dupuis was earning approximately $101,000.00/year. (V. 1, p. 98). In contrast, Young earned significantly less money than Dupuis and his commission percentage was much lower than Dupuis'. (V. 1, p. 98). Considering the fact that a younger, less-experienced, lower-paid employee replaced Dupuis, there are material fact issues regarding whether Snell's actions were motivated by an age-based discriminatory intent.

Contrary to the Fifth Circuit's claim that Dupuis failed to dispute the allegations of Black and the other employees who, allegedly complained that Dupuis was drinking, Dupuis specifically denied these allegations in his affidavit. Dupuis' affidavit directly controverts the alleged legitimacy of Snell's articulated reasons for his termination and sets forth additional evidence that he

was a victim of age discrimination. This, together with Dupuis' *prima facie* case of age discrimination, raises fact issues as to whether Dupuis was the victim of age discrimination. Thus, under *St. Mary's*, the district court's entry of summary judgment was improper. *See, St. Mary's, supra,* 113 S.Ct. at 2749. (V. 1, p. 164).

CONCLUSION

The evidence in this case is sufficient to defeat summary judgment as to Dupuis' age claim. *See, Bienkowski v. American Airlines, Inc.,* 851 F.2d at 1505 (the court reversed the district court's summary judgment even though the plaintiff's evidence was "barely sufficient to create a jury issue of intentional age discrimination"). A genuine issue of material fact exists regarding whether Snell has met its burden of producing a legitimate non-discriminatory reason for terminating Dupuis and/or whether Snell's articulated reason for termination was a pretext for age discrimination. Most importantly, Snell's stated reasons for termination are not credible and are not worthy of belief, and reasonable factfinder could infer that Dupuis was discriminated against because of his age. Where genuine issues of material fact exist on the essential elements of the party bearing the burden of proof's case, then summary judgment is not proper. *See, Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, it was error to grant summary judgment in this case.

WHEREFORE, PETITIONER, Percy Dupuis, respectfully prays that The Court grant Petitioner's Writ of

Certiorari, and reverse the judgments of the Court of Appeals for the Fifth Circuit and the district court with instructions to remand the case to the district court for a trial on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10200
Summary Calendar

PERCY DUPUIS,

Plaintiff-Appellant,

versus

DON SNELL BUICK, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1220-H)

(Filed Sept. 28, 1994)

Before, SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam[1]:

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant, Percy Dupuis (Dupuis) sued his former employer, Appellee, Don Snell Buick, Inc. claiming that he was discharged in violation of the Age Discrimination in Employment Act (ADEA). Appellee moved for summary judgment, which the trial court granted. Dupuis appeals, arguing that Defendant-Appellee failed to articulate a legitimate non-discriminatory reason for terminating Dupuis, and that the summary judgment evidence raised a genuine issue of material fact regarding whether age was a motivating factor in Appellee's decision to terminate Dupuis' employment. We affirm.

FACTS

Don Snell Buick is a dealership that sells, leases and services automobiles. Dupuis was the dealership's service manager from March 1975 until February 1992. At the time of his termination, Dupuis was sixty years old and was receiving a salary of approximately $101,000.00 per year. His responsibilities as service manager included supervising the service department personnel, conducting customer relations, test driving customer cars, and administering the warranty contract between General Motors Corporation and the dealership.

Beginning in the mid-eighties Dupuis began to have a problem with alcohol. On several occasions, Dupuis was counseled by Don Snell, the president of the company, and by Jim Snell, the general manager regarding his drinking problem. On May 3, 1989, Don and Jim Snell met with Dupuis and gave him the option of seeking treatment or being terminated. Dupuis, pursuant to an agreement reached with his employers, was hospitalized for

his drinking problem at Charter Hospital in May 1989. Don Snell Buick paid him his full salary during his treatment.

After completing treatment, Dupuis returned to work. In October 1989, Mike McCarley, Dupuis' co-worker, obtained Plaintiff's release from jail. Plaintiff had been drinking at home and had become abusive toward his wife and been arrested. On March 7, 1991, Jim Snell believed that Dupuis had been drinking on the job and confronted him. Dupuis denied having been drinking, and Snell reiterated that drinking during business hours was grounds for immediate termination.

According to Appellee, on January 27, 1992, Keith Black (Black), a District Service Manager for Buick Motor Division of General Motors Corporation, consulted with Dupuis regarding a rental car. Because Black is responsible for approving payment for warranty work performed at Don Snell Buick, it is necessary for the service department at Don Snell Buick to work with him frequently, and to maintain a good relationship. On January 31, 1992, Black reported to Jim Snell that Dupuis had been abusive and appeared drunk on January 27, 1992. Black also suggested that Dupuis had been drunk on other occasions, and Black did not want to work with Dupuis any more. Jim Snell investigated the incident, and a number of Appellee's employees confirmed that Dupuis had appeared intoxicated when he got out of his company car, and at other times during the work day on January 27, 1992.

Jim and Don Snell consulted together and decided to terminate Dupuis. On Monday, February 3, 1992, the

Snells told Dupuis that his drinking was a violation of company policy and was adversely affecting Dupuis' ability to perform his job, and that he was therefore terminated.

Although Dupuis does not deny the history of his drinking problem as set out in Appellee's evidence, Dupuis denies that he was drinking on January 27, 1992. He also denies being anything but civil to Black on that date.

STANDARD OF REVIEW

We review summary judgments *de novo*, applying the same standard as the district court. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). A court shall enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); FED. R. CIV. P. 56(c). The moving party need only point out the absence of a material fact dispute on any issue which the other party has the burden of proof. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. The non-moving party with the burden of proof on the merits must then introduce sufficient evidence to establish all essential elements of his claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The mere existence of some factual dispute between the parties is insufficient to avoid summary judgment. Rather, an issue of fact is "genuine" only if the evidence

is sufficient to support a reasonable jury verdict for the Plaintiff, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, any reasonable doubts or inferences must be decided in the light most favorable to the party opposing summary judgment. *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

Dupuis argues that summary judgment is "particularly inappropriate" in this employment discrimination case, because the ultimate question is the question of the employer's intent. This Court has cautioned that cases where state of mind is at issue may not be well-suited for summary judgment, *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991), but as long as the court keeps in mind the difficulties involved in ferreting out intent, summary judgment is not precluded. See *Id.* at 1266.

LEGITIMATE NON-DISCRIMINATORY REASON

The trial court ruling that Dupuis presented a prima facie case of age discrimination is not in dispute. Dupuis was 60 years old, qualified for the job of service manager, was terminated, and was replaced by a person who was 34 years old.

Once the plaintiff has established a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for plaintiff's termination. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993).

In its motion for summary judgment, appellee articulates two reasons for terminating Dupuis: one, violation of company policy prohibiting reporting to work under the influence of alcohol; and two, violation of company policy prohibiting operating a company vehicle while under the influence of alcohol.

Dupuis concedes that on their face, these articulated reasons appear to be legitimate non-discriminatory reasons for terminating an employee. However, he alleges that the trial court erred in holding that Appellee met its burden of production concerning these reasons. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (Defendant must set forth clearly and with reasonable specificity, through the introduction of inadmissible evidence, the reasons for the adverse employment action.) Dupuis alleges that the reasons articulated in Appellee's summary judgment motion are not identical to the reasons stated at the time of his termination (Dupuis was unwilling to stop drinking and was having a loss of productivity), or to the reasons stated at a Texas Employment Commission hearing (Dupuis was terminated because of the complaint by Keith Black that he was intoxicated on the job on January 27, 1992).

Dupuis argues here, as he did in the court below, that the various reasons articulated at different times are inconsistent and are evidence that the stated reasons are pretextual. The trial court rejected this argument, and so do we. The reasons stated by Appellee for Dupuis' termination are consistent and mutually reinforcing. A reasonable fact finder could not conclude that the reasons set forth by Defendant are conflicting. *Hanchey v. Energas Co.*,

925 F.2d 96, 99 (5th Cir. 1990) ("The reason given by [defendant] to [plaintiff] may indicate that the explanation was not complete, but a reasonable fact finder could not conclude that the reasons are conflicting or that they show the reasons articulated by [defendant] are unworthy of credence.")

We hold that appellee met its burden of production on the legitimate non-discriminatory reasons for Dupuis' termination.

DID THE EVIDENCE RAISE A FACT QUESTION?

A. The legal standard

Dupuis contends that the court below erred in granting summary judgment because the evidence raised genuine issues of material fact regarding whether Don Snell Buick's articulated reasons for termination are a pretext for age discrimination.

Dupuis argues that the trial court required a showing that the articulated reason was not true, plus additional evidence of age discrimination, which he refers to as a "pretext plus" requirement. He believes that was error because he was entitled under *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993) to get past summary judgment by establishing a prima facie case and calling into question the truthfulness of the articulated reason. He relies on the following language:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima

> facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proferred reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] upon such rejection, no additional proof of discrimination is *required.*

St. Mary's, 113 S.Ct. at 2749 (internal quotations and citation omitted, emphasis in original).

The quoted language is helpful only when placed in the context of the discussion of that immediately follows it. The Supreme court continued, saying that to hold that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff would disregard the fundamental principal of Rule 301 of the Federal Rules of Evidence that a presumption does not shift the burden of proof[2], and in the employment discrimination context, the plaintiff bears the ultimate burden of persuasion. *Id.* at 2749.

Once a defendant meets its burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Plaintiff must then persuade the fact finder that the reason stated by the defendant was

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[2] Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

not the true reason for the termination, and that plaintiff's age was. *St. Mary's*, 113 S.Ct. at 2747. Merely showing that the articulated reason for the termination was false is not sufficient to win as a matter of law. *St. Mary's*, 113 S.Ct. at 2748-49.

St. Mary's concerned an employment discrimination case in which the employer prevailed after a full bench trial. The question presented to this Court is what effect the *St. Mary's* decision has on a motion for summary judgment. The Fifth Circuit has recently interpreted *St. Mary's* in the summary judgment context in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

In *Bodenheimer*, the 57 year old plaintiff brought an age discrimination suit against his long-time employer. Plaintiff established a prima facie case, and defendant responded that plaintiff had been laid off in a reduction in workforce, a legitimate non-discriminatory reason for the termination. Plaintiff then submitted affidavits attempting to establish that the reduction in force was a pretext because he was better qualified than employees whom the defendant had not terminated. The Fifth Circuit concluded that the evidence submitted by the plaintiff which only attacked the employer's articulated reason for the termination was "incapable of addressing the central issue in these cases: was age a factor in the employer's decision to terminate the employee?" *Bodenheimer*, 5 F.3d at 959.

Thus, after deciding that Dupuis has established a prima facie case and after deciding that Appellee has articulated a legitimate, non-discriminatory reason, we must inquire if Dupuis has submitted summary judgment

evidence capable of addressing the central issue of whether or not age was a factor in Appellee's decision. *Bodenheimer,* 5 F.3d at 959. See also *Barrow v. New Orleans S. S. Ass'n,* 10 F.3d 292, 298 n. 22 (5th Cir. 1994) (at the summary judgment stage, "[t]o show that the defendants' proffered reason was a pretext for discrimination, however, [plaintiff] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for defendants' action"). If Dupuis has failed to present evidence capable of addressing Appellee's motive, then summary judgment is appropriate.

B. Employee statements.

In his affidavit, Dupuis says that just moments after his termination he overheard some Don Snell Buick employees discussing his termination and commenting that the company wanted to replace him with someone who was younger and would work for less pay. Although Dupuis cannot definitely say who participated in the conversation, he listed seven people who he thought were present. None of the people listed was involved in the decision to terminate Plaintiff.

Plaintiff's affidavit testimony on this issue is inadmissible hearsay which may not be considered by the court in summary judgment proceedings. *Martin v. John W. Stone Oil Distributor, Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); *Garside v. OSCO Drug, Inc.,* 895 F.2d 46, 50 (5th Cir. 1990). Further, an isolated instance of a potentially discriminatory statement made by a non-decision maker is insufficient to raise a question of material fact sufficient

to defeat summary judgment. *Waggoner v. Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993). This argument fails.

C. Dupuis' denial of the January 27, 1992 incident.

Dupuis has consistently denied that he was drunk at work on January 27, 1992 or that he had an altercation with Keith Black. Assuming, without deciding, that Dupuis has introduced evidence sufficient to create a fact question as to whether or not he was drinking on January 27, 1992, that fact question is not material to the issues in this case, and so does not provide a basis for reversing the lower court. The question before the court was Appellee's motivation for Dupuis' termination, not Dupuis' behavior. Dupuis has not called into question the fact that Don and Jim Snell received reports from Black and other employees that Dupuis had been drinking that day, they were aware of his history of drinking problems and they were motivated by their belief that on January 27, 1992 Dupuis violated company policy regarding the use of alcohol in deciding to terminate him.

D. Salary discrepancy

Dupuis alleges that the fact that he was replaced by a younger, less experienced and lower paid employee is proof of Appellee's intent to discriminate on the basis of age. However, he produced no evidence that salary considerations were a factor in the termination decision. This argument is without merit.

CONCLUSION

Dupuis failed to present summary judgment evidence that raised a genuine issue of material fact that a motivating factor for his termination was illegal age discrimination. The trial court's grant of summary judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PERCY DUPUIS,	*	
Plaintiff	*	Civil No.
	*	3:93-CV-1220-H
v.	*	
DON SNELL BUICK, INC.,	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant's Motion for Summary Judgment with supporting materials, filed November 24, 1993; Plaintiff's Response, filed December 13, 1993; and Defendant's Motion for Leave to Reply with Reply attached, filed December 21, 1993.

I. BACKGROUND

This is an age discrimination case.

Defendant is an automobile dealership that sells, leases and services automobiles. Plaintiff was continuously employed by Defendant from March, 1975, until February, 1992 as a service manager. *See* Plaintiff's Response, Ex. A, p. 1 ("Dupuis Aff."); Defendant's Brief Ex. K ¶ 5 ("J. Snell Aff."); Ex. N p. 52 ("Dupuis Dep."). At the time of his termination, Plaintiff was earning a salary of approximately $100,000 per year. *See* Dupuis Aff. at p. 3. At the time of his termination, Plaintiff was responsible for everything that occurred in the service department,

including supervising the service department employees, conducting customer relations, test driving customer cars, and administering the warranty contract between General Motors Corporation and Defendant. *See* Defendant's Brief at p. 2, Ex. J ¶ 5 ("D. Snell Aff."); J. Snell Aff. ¶ 6. The last of these duties, administering the warranty contract, occupied 20-30% of Plaintiff's time, and was viewed as an extremely important component of Plaintiff's job by Defendant. *Id.*

Defendant asserts, and Plaintiff does not deny, that, commencing in the mid-eighties, Plaintiff began to have a problem with alcohol. D. Snell Aff. ¶¶ 8-14; J. Snell Aff. ¶¶ 9-14. On multiple occasions, Defendant orally counseled Plaintiff regarding Plaintiff's drinking problem. *Id.* On May 3, 1989, Don and Jim Snell, Plaintiff's supervisors, met with Plaintiff and specifically advised him that his drinking would not be tolerated and would be grounds for termination if it persisted. D. Snell Aff. ¶ 11; J. Snell Aff. ¶ 10, and attachment 2; Dupuis Dep. at p. 120. Pursuant to the meeting of May 3, 1989, Plaintiff agreed to, and did, seek treatment for his drinking problem from the Charter Hospital. *Id.;* Dupuis Dep. p 116-117; Defendant's Brief Ex. C. Attachments 1-3.

After completing the treatment, Plaintiff returned to work, but demon rum had not been exercised. In October, 1989, or thereabouts, Mike McCarley, an employee of Defendant, obtained Plaintiff's release from jail; Plaintiff had apparently been drinking at home and had become abusive toward his wife and been arrested. Dupuis Dep. p. 26-27; Defendant's Brief, Ex. I, ¶ 8 ("McCarley Aff."). On March 7, 1991, Jim Snell believed that Plaintiff had been drinking on the job and confronted Plaintiff. J. Snell

Aff. ¶ 14 and Attachment 3. Plaintiff denied having been drinking. *Id.* Jim Snell reiterated that drinking during business hours was grounds for immediate termination. *Id.*

The incident upon which Defendant is claiming to base Plaintiff's termination occurred on January 27, 1992. Unlike the above related facts, Plaintiff disputes Defendant's version of the events of January 27, and argues that the January 27 incidents never occurred.

According to Defendant, on January 27, 1992, Keith Black, a District Service Manager for Buick Motor Division of General Motors Corporation, consulted with Plaintiff regarding a rental car. Defendant's Brief at p. 4, Ex. B p. 2-3 ("Black Aff."). On January 31, 1992, Black reported to Jim Snell that Plaintiff had been abusive and appeared drunk on January 27, 1992. *Id.* Black also suggested that Plaintiff had been drunk on other occasions, and that Black desired to not have to work with Plaintiff any more. *Id.* As noted above, Plaintiff's work with General Motors warranties constituted a significant portion of Plaintiff's duties, and Defendant took the complaint from the General Motors representative seriously. Jim Snell investigated the incident, and a number of Defendant's employees confirmed that Plaintiff had been drunk on January 27, 1992. J. Snell Aff. ¶¶ 16-19; *see also* Defendant's Brief Ex. F, ¶ 4; Ex. G, ¶ 4; McCarley Aff. ¶ 9.

Jim and Don Snell consulted with one another on Saturday, February 1, 1992, regarding what action to take against Plaintiff. D. Snell Aff. ¶¶ 15, 16; J. Snell Aff. ¶¶ 21, 22. The Snells decided that Plaintiff had become

ineffective as Service Manager and posed a safety risk. *Id.* The Snells decided to terminate Plaintiff. *Id.*

On the following Monday, February 3, 1992, Plaintiff was terminated. At the Monday meeting, Defendant informed Plaintiff that Plaintiff's drinking was a violation of company policy and was adversely affecting Plaintiff's ability to perform his job. Defendant than terminated Plaintiff.[1] J. Snell Aff. ¶ 23 and Attachment 1; Dupuis dep. p. 131.

As noted above, Plaintiff denies that he had been drinking on January 27, 1992. Depuis Aff. p. 1-2. Plaintiff further denies that he was abusive of Keith Black or treated Keith Black in anything but a civil manner. *Id.* Plaintiff further argues that nobody confronted him on January 27, 1992, to find out if he had been drinking, and that the alleged incident of January 27, 1992, was not mentioned at the termination meeting. *Id.*

Plaintiff adds that as he was cleaning out his desk on February 3, 1992, he overheard a conversation amongst a group of unidentified employees of Defendant. Plaintiff claims that during the course of this conversation, the employees said that "the dealership (Don Snell Buick) wanted to replace [Plaintiff] with someone younger and someone who would work for less pay." *Id.*

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[1] In support of its Motion, Defendant has presented evidence relating to Plaintiff's activity months after Plaintiff left Defendant's employ. This evidence is irrelevant to determining the reason for Plaintiff's discharge. The Court will not consider this evidence in deciding this Motion.

On May 26, 1993, Plaintiff filed his Original Petition in the 44th Judicial District Court of Dallas County, Texas. In his Original Petition, Plaintiff alleges that he was employed by Defendant and that Defendant discriminated against Plaintiff on the basis of age by terminating Plaintiff and by discriminating against Plaintiff in the terms, conditions and privileges of employment. Plaintiff also alleges that Defendant retaliated against Plaintiff.[2] Plaintiff asserts that Defendant's actions violated the Texas Human Rights Act of 1983 ("THRA"), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). Plaintiff also asserts that he complied with the procedural prerequisites to maintaining this suit, such as filing complaints with the Equal Opportunity Commission and the Texas Commission on Human Rights, and receiving right-to-sue notices from each of the respective agencies.

On June 22, 1993, Defendant filed its Original Answer in state court, then removed the case to this Court. Federal jurisdiction is appropriate under ADEA and 28 U.S.C. § 1441(b).

On November 24, 1993, Defendant filed its Motion for Summary Judgment. On December 13, 1993, Plaintiff

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[2] The Court finds that Plaintiff has abandoned his claim of retaliation. Defendant presentd legal argument supported by summary judgment evidence on Plaintiff's claim of retaliation. *See* Defendant's Brief at p. 14. At no time has Plaintiff articulated the basis of his retaliation claim, and, in his Response, Plaintiff failed to respond to Defendant's argument. Plaintiff's claim of retaliation is **DISMISSED.**

filed his Response. On December 21, 1993, Defendant filed its Motion for Leave to Reply.

II. MOTION FOR LEAVE TO REPLY

The Court first addresses Defendant's Motion for Leave to Reply. After consideration, the Court is of the view that Defendant's Motion for Leave to Reply should be, and hereby is, **GRANTED.** The Clerk of the Court is directed to file Defendant's Reply.

III. STANDARDS

Defendant's Motion for Summary Judgment and Plaintiff's Response thereto raise on intricate question focusing on the shifting burdens of an age discrimination case and the sufficiency of evidence in response to a motion for summary judgment. In particular, the Court must apply the Supreme Court decision of *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 113 S.Ct. 2742 (1993) and the subsequent Fifth Circuit decision of *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955 (5th Cir. 1993) to the facts of this case.

A. SUMMARY JUDGMENT STANDARDS

In proper circumstances, awarding summary judgment is not disfavored in the federal courts: "[s]ummary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to

litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the non-movant's case. *See Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992). The threshold inquiry, therefore, is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Of Course, "the substantive law will identify which facts are material." *Id.* at 248.

The Supreme Court has explained that a movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish each element as to which that party will have the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986).

Once the burden shifts, the non-moving party must "come forward with 'specific facts showing that there is a

genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (*quoting* Rule 56(e)); *see also Fontenot*, 780 F.2d at 1195-98. A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Stated another way, "[i]f the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing *Matsushita*, 475 U.S. at 587). In determining whether a genuine issue exists for trial, all of the evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

B. STANDARDS IN DISCRIMINATION CASES

Plaintiff argues that since the ultimate question in most employment discrimination cases is the question of the employer's intent, summary judgment is particularly inappropriate in employment discrimination cases. *See* Plaintiff's Response at p. 2-3 (citing *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985); *Transource International, Inc. v. Trinity Industries*, 725 F.2d 274 (5th Cir. 1984); *E.E.O.C. v. Southwest Texas Methodist Hospital*, 606 F.2d 63, 65 (5th Cir. 1979), *cert. denied*, 455 U.S. 928 (1980). Plaintiff is correct that summary judgment is difficult to sustain in employment discrimination cases, but it is not absolutely prohibited. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 n. 3 (5th Cir. 1993) ("While courts should be ever vigilant in granting summary judgments – whether or not state of mind is at issue – they are not precluded from ruling as such.")

(*citing with approval Medina-Munoz v. R.J. Reynolds Tobacco*, 896 F.2d 5, 8 (1st Cir. 1990); *Morgan v. Harris Trust and Sav. Bank*, 867 F.2d 1023, 1026 (7th Cir. 1989); *LeFevre v. Space Communications*, 771 F.2d 421, 423 (10th Cir. 1985)). Thus, the Court approaches Defendant's Motion with an acute awareness of the fact-based nature of the inquiry into Defendant's intent.

In order to effectively apply the general summary judgment standards elicited above to employment discrimination cases, the Court finds it necessary to set forth the scheme of shifting burdens involved in employment discrimination cases.[3]

Generally, in employment discrimination cases, the burdens lie as follows:

The initial burden rests on the plaintiff to establish a prima facie case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817 (1973); *St. Mary's Honors Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993). To establish a prima facie case in a suit for age discrimination, a plaintiff must show: (1) that he was over 40 years old; (2) that he was qualified to perform the job; (3) that he was discharged; and (4) that he was replaced by a younger person. *Guthrie*, 941 F.2d at 376; *Bodenheimer*, 5 F.3d at 957.

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[3] The Court notes that much of employment discrimination jurisprudence has developed under interpretations of Title VII rather than ADEA. The Fifth Circuit applies the same standards to ADEA cases as it does to Title VII cases. *Guthrie v. Tifco Industries*, 941 F.2d 374, 376 (5th Cir. 1991), *cert. denied* 112 S.Ct. 1267 (1992); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 n. 4 (5th Cir. 1993).

Once the plaintiff has established a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason ("LNDR") for plaintiff's termination. *St. Mary's*, 113 S.Ct. at 2747. In order to rebut the presumption of discrimination raised by the establishment of a prima facie case, an employer need not prove the LNDR, but must merely produce some evidence to support the LNDR. *Id.* at 2748. This burden of production is an extremely light burden, and the Court may not assess the credibility of the stated LNDR. *Id.* Rather, if the employer has produced any evidence, "which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action," then the employer has satisfied its burden. *Id.* (emphasis in original).

If the defendant satisfies its burden, the plaintiff then bears the ultimate burden of proving that the reason stated by the defendant is actually pretext for age discrimination. *St. Mary's*, 113 S.Ct. at 2747, 2749. After the *St. Mary's* decision, it has become clear that once the employer articulates its LNDR, the shifting burden scheme is abandoned and becomes irrelevant. *Id.* at 2749. Neither the prima facie case nor the articulated LNDR carry any presumptive weight.

The question then arises as to what weight a fact-finder must give proof by the plaintiff that the articulated LNDR is false. In many jurisdictions prior to *St. Mary's*, if a plaintiff proved that the articulated LNDR was false, plaintiff was entitled to judgment as a matter of law. *St. Mary's*, 113 S.Ct. at 2759-2760 (Souter, J. dissenting) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981)). *Cf. Britt v. The Grocers Supply*

Co., Inc., 978 F.2d 1441, 1450 (5th Cir.), *cert. denied* 113 S.Ct. 2929 (1992) ("[T]he plaintiff must prove that the defendant's reasons are pretexts for unlawful discrimination either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence."). This rule was created under the theory that proving an employer's intent is intensely difficult; in light of that difficulty, proof that the employer's stated reason for termination was false was as conclusive proof as possible that the employer's stated reason was pretext for illegal discrimination. *See St. Mary's*, 113 S.Ct. at 2760-61 (Souter, J. dissenting).

The Supreme Court rejected this reasoning in *St. Mary's*, holding that a plaintiff who proved that the employer's stated reason was false was not entitled as a matter of law to a finding of intentional discrimination. Rather, after the employer has articulated its LNDR, the question of the employer's intent is a question of fact on which the plaintiff carried the burden of persuasion to be determined from all the evidence. After *St. Mary's*, a plaintiff may only succeed if he can prove that the defendant took adverse action against plaintiff *because of illegal discriminatory intent*. Merely showing that the articulated LNDR was false is not sufficient to win as a matter of law. *St. Mary's*, 113 S.Ct. at 2748-49.

The Supreme Court clarified this holding as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima

> facie case suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's, 113 S.Ct. at p. 2749 (emphasis in original).

The case before the *St. Mary's* court was decided at trial. The question presented to this Court is what effect the *St. Mary's* decision has on a motion for summary judgment. The Fifth Circuit has recently interpreted *St. Mary's* in the summary judgment context in *Bodenheimer v. PPG Industries, Inc.,* 5 F.3d 955 (1993).

In *Bodenheimer,* the 57 year old plaintiff brought an age discrimination suit against his long-time employer. In that case, it was not contested that plaintiff satisfied the prima facie case. Defendant articulated the LNDR of a reduction in workforce. Plaintiff then responded with affidavits which raised a question as to whether the reduction in workforce was the true reason for plaintiff's termination because plaintiff was better qualified than employees whom the defendant had not terminated. The Fifth Circuit found that the evidence submitted by the plaintiff was insufficient to support the proposition that the plaintiff was better qualified than the retained employees. In the alternative, the Fifth Circuit stated:

> [E]ven if an employee has established that he was clearly better qualified than his or her replacement, that showing may be insufficient to clear the summary judgment hurdle. Such comparative evidence would raise doubts as to the employer's actual motive for terminating the employee. Indeed, prior to *St. Mary's,* such evidence certainly would be sufficient to avoid

> summary judgment and perhaps prevail at trial. But *St. Mary's* requires more of the plaintiff than simply negating the employer's defense. The *St. Mary's* Court was clear in its directive: the employee has the burden of persuasion at trial. Therefore, in ADEA cases, a court considering summary judgment must decide whether plaintiff's facts, if believed, would prove that, more likely than not, the employer fired the employee because of age.

Bodenheimer, 5 F.3d at 959, n. 8. The Fifth Circuit ultimately concluded that the evidence submitted by the plaintiff in the case which only attacked the employer's articulated LNDR was "incapable of addressing the central issue in these cases: was age a factor in the employer's decision to terminate the employee?" The Fifth Circuit concluded that summary judgment was proper under the circumstances.

Thus, in following the Fifth Circuit's interpretation of *St. Mary's*, after deciding that Plaintiff has established a prima facie case and after deciding that Defendant has articulated an LNDR, the Court must inquire if Plaintiff has submitted summary judgment evidence capable of addressing the central issue of whether or not age was a factor in the employer's decision to terminate the employee. *Bodenheimer*, 5 F.3d at 959 *See also Barrow v. New Orleans Steamship Association*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994) (at the summary judgment stage, "[t]o show that the defendants' proffered reason was a pretext for discrimination, however, [plaintiff] must offer evidence not only that the defendants' proffered reason was false, but also that age discrimination was the real reason for the defendants' action"). If Plaintiff has failed to present

evidence capable of addressing Defendant's motive, then summary judgment is appropriate. Otherwise, Defendant's Motion must be denied.

IV. ANALYSIS

A. PRIMA FACIE CASE

Defendant does not seriously context that Plaintiff has satisfactorily presented a prima facie case of age discrimination.[4] Thus, the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for Plaintiff's termination.

B. LEGITIMATE NON-DISCRIMINATORY REASON

Defendant has articulated a legitimate non-discriminatory reason for Plaintiff's termination. Defendant has stated that Plaintiff was fired because Plaintiff was drunk on the job in violation of company policy. Defendant has supported the stated reason with summary judgment evidence in the form of sworn affidavits. Defendant has bolstered the stated reason by providing the Court with a history of Plaintiff's drinking problem, and with evidence

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[4] Plaintiff was 60 years at the time of his termination. Plaintiff had worked for Defendant for 17 years as service manager; Plaintiff was qualified to do the job of service manager. Plaintiff was terminated on February 3, 1992. Raney Young took over the duties which had previously been assigned to Plaintiff. Raney Young was 34 at the time that Plaintiff was terminated. Plaintiff, therefore, was replaced by a younger person.

showing Defendant's actions toward accommodating Plaintiff's drinking problems.

The Court finds that Defendant has satisfied its burden. Since Defendant has articulated an [sic] LNDR, the *McDonnell-Douglas* burden shifting scheme is no longer relevant to this case. *St. Mary's,* 113 S.Ct. at p. 2749. Plaintiff now carries the ultimate burden of persuasion and, in order to survive summary judgment, must present qualified summary judgment evidence raising a question as to whether Defendant's reason for terminating Plaintiff was illegal discrimination. *Bodenheimer,* 5 F.3d at p. 959.

C. DISCRIMINATION

Plaintiff has presented four arguments as to why Defendant's stated reason is pretext for discrimination:

> (1) By proving the prima facie case and showing the Plaintiff's salary was substantially larger than that of his replacement, Plaintiff has raised a material issue of fact.
>
> (2) Plaintiff denies that he was drunk on January 27, 1992, thus directly disputing Defendant's representation and calling into question a material issue of fact.
>
> (3) Defendant has altered the stated reason for Plaintiff's termination on three different occasions, thus raising a question as to whether the currently stated reason is the real reason.
>
> (4) Employees of Defendant stated that Defendant fired Plaintiff in order to replace Plaintiff with a younger worker.

In support of these four arguments, Plaintiff has submitted two pieces of summary judgment evidence: (1) Plaintiff's affidavit; and (2) Defendant's Answers to Interrogatories. The Court will address each of Plaintiff's arguments in turn.

1. SALARY DISCREPANCY

In his Response, Plaintiff argues:

> At the time of his termination, Dupuis was earning approximately $101,000/year. Young earned significantly less money than Dupuis and, as [sic] his commission percentage was much lower than Dupuis'. Considering the fact that a younger, less experienced, much lower paid employee replaced [Plaintiff] there are material fact issues regarding whether the Defendant's actions were motivated by an age-based discrimination.

Plaintiff's Response at p. 10.

Plaintiff has cited no case which supports the position that differential in salary between an older worker and his younger replacement is sufficient to support a finding of age discrimination. The Court was able to find a number of cases which discussed the issue. The courts which have addressed the issue are split in their treatment of salary differential.

For instance, the Seventh Circuit has held that replacing older workers with younger workers because the older workers are more expensive is illegal discrimination on the basis of age and is prohibited by ADEA. *See Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987). *See*

also Wolf v. Ferro Corp., 772 F.Supp. 139 (W.D.N.Y. 1991). On the other hand, courts in North Carolina and Michigan have held that higher labor costs associated with older employees constitute reasonable factors other than age which an employer may legitimately consider in terminating an employee. *See Wilson v. Popp Yarn Corp.*, 680 F.Supp. 208 (W.D.N.C. 1988); *Mastie v. Great Lakes Steel Corp.*, 424 F.Supp. 1299 (E.D. Mich. 1976). *See Metz*, 828 F.2d at 1211 (Easterbrook, J. dissenting). *See also Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985) (if older worker's productivity does not justify older worker's higher salary, then it is not age discrimination to replace the older worker with a younger worker at a lower salary); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980). *Cf. Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1707 (years of service is analytically distinct from age).

The Fifth Circuit has not considered this precise issue. The Fifth Circuit has indicated, however, that if it were presented with the question, it would not find salary to equate with age for discrimination purposes. *See Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97, 99 (5th Cir.), *cert. denied* 113 S.Ct. 2929 (1993) ("In addition to being factually distinguishable from *Metz*, this Court has not adopted the *Metz* line of reasoning, and we decline to do so in this case."); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991) (seniority is not correlative with age).

The Court does not decide if proof that an employer fired an older worker in an attempt to reduce salary costs is proof of age discrimination because Plaintiff has failed to present any proof that Plaintiff's salary contributed to

Defendant's decision. For a plaintiff to succeed on a salary-based theory, there must be some showing that the difference in salary between the older and the younger worker was considered by the decision-makers in deciding to terminate the older worker. In all the cases which have considered this question, one of the LNDR's expressed by the employer has been the goal of reducing the cost of the payroll.[5] Defendant has not indicated in any way, nor has Plaintiff presented any qualified evidence, that Defendant was concerned about Plaintiff's salary. The mere existence of the difference in salary is insufficient to raise a material factual issue. Were the Court to hold otherwise, every frivolous or insubstantial claimant could defeat summary judgment by submitting his or her pay-stub to the Court.

The Court concludes that Plaintiff must produce some corroborating evidence to show that the difference in the salary was a factor in the termination decision in order for the Court to even consider the difference in salary as a possible reason for the termination. In this case, Plaintiff has provided no support for his allegation that the salary differential between him and Young was the motivating factor in his termination.[6] Hence, the

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[5] For example, in *Metz*, the employer stated that the reason for the older worker's termination was "a desire to save the higher cost of Metz's salary." 828 F.2d at 1205.

[6] Plaintiff has stated in his affidavit that he overheard fellow-employees saying that the salary differential was the motivating factor in Defendant's decision to terminate Plaintiff. Plaintiff has not alleged, however, that the declarant was a decision-maker or that the declarant had any grounds on which to base his conclusory statement. As discussed below, the

Court finds that Plaintiff has failed to raise a material issue of fact on this issue.

2. PLAINTIFF'S DENIAL

Plaintiff next argues that there is a material issue of fact regarding the incident on January 27, 1992. Plaintiff argues as follows:

> Defendant claims to have fired Plaintiff because Plaintiff had been drinking during business hours. In particular, Defendant points to the incident alleged to have occurred on January 27, 1992, as the impetus for Plaintiff's termination. In his sworn affidavit, Plaintiff denies having been drunk on January 27, 1992. Plaintiff further denies having been abusive toward Keith Black on January 27, 1992. Plaintiff argues that if he was not drunk on January 27, 1992, then Defendant's LNDR must be false, and if the LNDR is false, then the LNDR was pretext for age discrimination. Thus, by submitting summary judgment evidence to the effect that he was not drunk on January 27, 1992, Plaintiff concludes that he has raised a material issue of fact sufficient to defeat summary judgment.

Plaintiff's argument is mistaken in two ways. First, even if Plaintiff is believed, and a trier of fact found that Plaintiff was not drunk on January 27, 1992, a trier of fact

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declarant's statement, as presented by Plaintiff, is insufficient to raise a material question of fact.

could still believe that Defendant fired Plaintiff for drinking on the job. Defendant has presented unrefuted evidence of Plaintiff's history of alcohol abuse, including sworn affidavits which state that "[o]n various occasions, I witnessed Mr. Dupuis in an intoxicated state during working hours"[7] and "[g]iven the frequency of Mr. Dupuis' intoxicated state at work, I fail to see how Mr. Dupuis was able to perform his job except by force of habit."[8] Defendant's have also presented unrefuted evidence that Plaintiff's supervisors were aware of Plaintiff's drinking problem and considered Plaintiff's ongoing drinking problem when deciding to fire Plaintiff. Defendant's termination of Plaintiff for drinking on the job is not wholly reliant on the isolated incident on January 27, 1992. Thus, Plaintiff has failed to submit evidence which effectively rebuts Defendant's LNDR.

Second, and more important, even if Plaintiff is believed and even if Plaintiff has effectively refuted Defendant's LNDR, Plaintiff has presented absolutely no qualified summary judgment evidence which indicates that age was a factor in Defendant's decision to terminate Plaintiff. *See Bodenheimer,* 5 F.3d at 959; *Barrow,* 10 F.3d at n. 22. As discussed above, the Court will not consider the unsupported allegations that the salary differential between Plaintiff and Young was a motivating factor in Defendant's decision. And, as discussed below, the Court will not consider Plaintiff's allegations of statements

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[7] Herring Aff. ¶ 4.

[8] McCarley Aff. ¶ 6. *See also* Davis Aff. ¶ 7 ("[January 27] was not the first time that I have witnessed Mr. Dupuis in an intoxicated state".)

made by unidentified non-decision-makers. Plaintiff is wholly reliant upon the inference created by a showing that the LNDR might be false. After *Bodenheimer,* this inference is insufficient to defeat a Motion for Summary Judgment.

3. DEFENDANT'S INCONSISTENCY

In an act of desperation, Plaintiff attempts to construe four statements made by Defendant at different times as inconsistent with one another. Plaintiff argues that at the time of termination, Don and Jim Snell told Plaintiff that he was being terminated because he was unwilling to stop drinking and because he was having a loss of productivity. At the Texas Employment Commission ("TEC") hearing, Jim Snell stated that the reason for termination was because of the complaint by Keith Black that Plaintiff intoxicated on the job on January 27, 1992. In answers to interrogatories, Defendant stated that Plaintiff was terminated for violating company policy prohibiting drinking during working hours. Finally, in their respective affidavits, the Snells assert that Plaintiff was terminated for violating the company policy prohibiting drinking during business hours and for violating the company policy prohibiting the driving of a company car while intoxicated.

Plaintiff argues that the four reasons stated above are inconsistent and are evidence that Defendant cannot state the real reason for Plaintiff's termination which, Plaintiff argues, was age discrimination. Plaintiff's argument is not only meritless, but fatuous. The reasons stated by Defendant for Plaintiff's termination are consistent and

mutually reinforcing. A reasonable factfinder could not conclude that the reasons set forth by Defendant are conflicting. *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("The reason given by [defendant] to [plaintiff] may indicate that the explanation was not complete, but a reasonable factfinder could not conclude that the reasons are conflicting or that they show that reasons articulated by [defendant] are unworthy of credence.").

Plaintiff has failed to raise a material issue of fact as to the consistency of Defendant's stated reasons for terminating Plaintiff.

4. EMPLOYEE STATEMENTS

Finally, Plaintiff relies on his allegation that he overheard some of Defendant's employees discussing his termination shortly after it occurred. The employees were alleged to have said that Defendant wanted to replace Plaintiff with someone younger and someone who would work for less pay. While Plaintiff can not definitely identify the speaker who made the statement, Plaintiff does not allege that the speaker was a person who had made the decision to terminate Plaintiff.

An isolated instance of a potentially discriminatory statement made by a non-decision maker is insufficient to raise a question of material fact sufficient to defeat summary judgment. *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied* 112 S.Ct. 1267 (1992); *Frieze v. Boatmen's Bank of Belton*, 950

F.2d 538, 541 (8th Cir. 1991); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990).

V. CONCLUSION

Plaintiff has presented a prima facie case of age discrimination. Defendant has articulated a legitimate, non-discriminatory reason for Plaintiff's termination. Plaintiff has failed to present summary judgment evidence sufficient to raise a material issue of fact that a motivating factor for Plaintiff's termination was illegal age discrimination.

Defendant's Motion for Summary Judgment is **GRANTED.**

SO ORDERED.

DATED: January 31, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT
NORTHERN DISTRICT
OF TEXAS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PERCY DUPUIS,	*	
	*	
Plaintiff	*	Civil No.
v.	*	3:93-CV-1220-H
	*	
DON SNELL BUICK, INC.,	*	
	*	
Defendant.	*	

JUDGMENT

(Filed Jan. 31, 1994)

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, filed January 31, 1994, granting the Motion for Summary Judgment of Defendant Don Snell Buick, Inc.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Percy Dupuis take nothing by his suit against Defendant Don Snell Buick, Inc., and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SIGNED this 31st day of January, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT
NORTHERN DISTRICT OF
TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PERCY DUPUIS, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 3:93-CV-1220H
DON SNELL BUICK, INC., Defendant.	)	

AFFIDAVIT OF PERCY DUPUIS

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Percy Dupuis, who is known to me and, who after being duly sworn, deposed as follows:

> "My name is Percy Dupuis. I am over the age of 18 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above styled case. I was employed by the Defendant, Don Snell Buick, until I was terminated.
>
> I was employed by the Defendant from 1975 until my termination on February 3, 1992. I was employed as the Service Manager for Don Snell Buick. I had been employed in this position for approximately 17 years and I was qualified for the position.

I was working as the service manager on January 27, 1992. While I was working, Keith Black, the District Service Manager for Buick Motor arrived at Don Snell Buick. When Black arrived, Black was demanding that I provide him with a rental car for a customer who was having some work done on the customer's car. This was not my responsibility. Black was to make arrangements with an outside agency for a rental car. Black was insistent though so I told him I could provide him with a rent car. Contrary to Black's affidavit I did not throw the rent car keys to him. I handed Black the keys. I did not see Black for the rest of the day. Neither Black nor any employee or representative of Don Snell Buick asked me that day if I had been drinking or was intoxicated while on the job.

At no time on January 27, 1992 did I drink any alcohol. I did not report to work on January 27, 1992 under the influence of alcohol. I was not intoxicated on the job on January 27, 1992. I was not driving a company vehicle while intoxicated on January 27, 1992.

On February 3, 1992, I was terminated from my employment at Don Snell Buick by Jim Snell, the General Manager of Don Snell Buick. At the time of my termination, Jim Snell told me that I was being terminated because "I was unwilling to stop drinking and I was having a loss in productivity." I told Snell that I had not had a drink since the previous Sunday. I had not been drinking or been intoxicated on the job on February 3, 1993, [sic] nor did I arrive for work under the influence of alcohol on February 3, 1992. At no time during this meeting with Jim Snell did

Snell mention Keith Black or an alleged complaint made by Keith Black that I had been drinking or was intoxicated on the job on Monday, January 27, 1992. Snell did not tell me that there had been complaints that I had been drinking or intoxicated during working hours made by any Don Snell Buick employee. At no time during this meeting did Snell state that I had violated a company policy about drinking on the job or about driving a company vehicle under the influence of alcohol. Snell did not ask me during this meeting if I had been drinking or intoxicated during working hours on January 27, 1992. During this meeting, Snell did not mention my driving company vehicles and he did not ask me if I had been driving a company vehicle while intoxicated.

After I was terminated I went to my office and was taking some of my personal belongings out of my desk. At this time, there was group of Don Snell Buick employees standing just outside my office. The door to my office was open and I could hear them talking. They were discussing my termination and were saying that the dealership (Don Snell Buick) wanted to replace me with someone younger and someone who would work for less pay. I can not positively state who all was present during this conversation, or who said what, but persons present in the department at that time were possibly the body shop manager, Mike McCarley; the dispatcher, Johnny Kroseski (I am not sure of the exact spelling of his last name); the make-ready manager, Mike Taylor; and service advisors, Anthony Ashley, Carl Contreras, Jeff Hamlin, David Herring (I do not recall their names).

After terminating me, the Defendant replaced me with Raney Young. Young was approximately 34 years old at the time. I was 60 years old at the time I was terminated. At the time of termination I was earning approximately $101,000.00/year as the service manager. Part of the reason I was so highly paid was because of my 17 years of tenure with the Defendant. Young was paid on a different pay scale that [sic] I was and his percentage on his commissions were less.

I was terminated due to my age, 60 years. Following my termination, I have searched for employment. I have lost earnings as a result of my termination. The Defendant's stated reasons for termination are not true.

I attended a hearing for Appeal No. 92-122342-1-0492 which was held at the Texas Employment Commission Appeals office in Dallas, Texas on April 8, 1992. The hearing officer was John Kirchner. Don Snell Buick, the employer was represented by Jim Snell and Jim Bush. A tape recording was made of this hearing. I have reviewed the testimony of the hearing. The appeal was brought after an initial finding that I had been discharged for misconduct. Later after the hearing the TEC found no misconduct. At the hearing, Jim Snell stated that the reason I was terminated was: "Intoxicated on the job". Snell stated that this (being intoxicated on the job) occurred on the Monday prior to my termination on February 3, 1992 (i.e., January 27, 1992). Snell then stated that he believed I was drinking or intoxicated on the job on January 27, 1992 based on a complaint made by Keith Black. Snell stated: "He [Black] came to

my office and said, I just can't deal with Percy. He's belligerent, abusive, and to be real honest with you, I think he was drunk. . . . So at that time I asked a number of other employees if that was the case, if on that particular Monday, Percy had been drinking or had been drunk and there was, everybody, I asked just kind of said yes that he had. . . . "

Snell admitted that he did not see me, Percy Dupuis, drinking on January 27, 1992 or an any particular day immediately preceding my discharge. Snell admitted that I was not intoxicated on the day I was terminated. Snell also stated that he did not ask me at the time of termination if I had been intoxicated or drinking on the job on January 27, 1992. Snell admitted that Raney Young was being paid on a commission and that his commission percent is less than mine was. At the hearing Jim Bush, testified that he actually saw me on January 27, 1992 and that he could not say that I was intoxicated. Bush stated that I was not stumbling or staggering and that I *did not* smell like alcohol.

FURTHER AFFIANT SAYETH NOT.

/s/ Percy Dupuis
Percy Dupuis

SWORN TO AND SUBSCRIBED before me this 13th day of December, 1993.

[seal] /s/ Marie Yvette Boothe
Notary Public

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PERCY DUPUIS	§	
	§	CIVIL ACTION NO.
vs.	§	
	§	3:93-CV-1220H
DON SNELL BUICK, INC.	§	

AFFIDAVIT OF DON SNELL

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Don Snell who, on oath after being duly sworn, deposes and states as follows:

1. My name is Don Snell. I am 74 years of age, and am competent to make this Affidavit. I have personal knowledge of all the facts recited herein and such facts are true and correct.

2. I am currently employed as President of Don Snell Buick, Inc. ("Don Snell Buick"). I have held this position since 1973.

3. I purchased the dealership currently bearing the name Don Snell Buick in 1973.

4. I hired Percy Dupuis as the Service Manager for Don Snell Buick in March 1975. Until January 1989, when I opened a Volvo dealership in Richardson and relocated

my primary office to the Richardson dealership, Mr. Dupuis reported directly to me. From January 1989 until the termination of his employment, Mr. Dupuis reported directly to Jim Snell.

5. As Service Manager for Don Snell Buick, Mr. Dupuis was 100% responsible for the service department, including supervising the service department employees and the service and repair work they performed. He was responsible for maintaining customer contacts and good customer relations, test driving customer cars as well as new cars at the dealership, and for the administration of warranty between Buick Motor Division of General Motors Corp. ("Buick") and the dealership.

6. Twenty to thirty percent of the work performed by Don Snell Buick's service department is warranty work. Payment for warranty work can only be received from Buick and requires the approval of Buick's representative. Buick's representative in 1992 was Keith Black, district service manager. A vital function of Don Snell Buick's Service Manager's job was to maintain good relations with Buick's representative in the administration of warranty work.

7. Another requirement for Mr. Dupuis' position was that he maintain a good driving record and a valid driver's license.

8. During his years of employment, it became apparent that Mr. Dupuis had a problem with alcohol which impacted his job performance. Customers as well as co-workers complained about Mr. Dupuis' drinking and his belligerent and abusive behavior. While Mr. Dupuis was very visible in the service area, forming

valuable relationships with customers, during the early years of his employment, as his drinking increased Mr. Dupuis became less visible and his interfacing with customers more unpredictable.

9. It is my preference to maintain a family atmosphere among the employees at Don Snell Buick, and because of the long term relationship we had with Mr. Dupuis, as well as his contributions to the success of the service department at Don Snell Buick, Jim Snell and I counseled Mr. Dupuis orally on various occasions without supporting written documentation of these warnings.

10. On July 7, 1988, it had become increasingly evident that Mr. Dupuis' drinking was affecting his job performance and other employees. I counseled Mr. Dupuis about drinking on the job, expressly instructing him that Don Snell Buick employees are not allowed to drink during working hours, including during their lunch periods. A true and correct copy of my handwritten guidelines memorializing this counseling session is attached hereto as *Attachment 1.*

11. On May 3, 1989, Mr. Dupuis' drinking problem and the problems associated with it became so serious that I met with Mr. Dupuis and gave him the option of seeking treatment for his drinking problem or being terminated. Mr. Dupuis' behavior during this meeting indicated that he was intoxicated at the time. Jim Snell was present at this counseling session.

12. After some deliberation, Mr. Dupuis reluctantly agreed to seek treatment, and I made it clear that no further warnings would be issued if it was determined that he was drinking alcoholic beverages or intoxicated

during working hours after the completion of such treatment.

13. While Mr. Dupuis was treated for his drinking problem at Charter Hospital, Don Snell Buick continued to pay him his full salary.

14. Upon Mr. Dupuis' return to Don Snell Buick, he (Mr. Dupuis) told me that being at Charter Hospital was like being in jail, and he never wanted to go through that again.

15. On Saturday, February 1, 1992, I met with Jim Snell to discuss the January 27, 1992 incidents reported by Keith Black and the results of Jim Snell's investigation into such allegations.

16. Jim Snell and I decided that Mr. Dupuis was clearly in violation of the company's policies prohibiting (1) reporting to work under the influence of alcohol and (2) operating a company vehicle under the influence of alcohol. Mr. Dupuis' continual violations of such policies had rendered him ineffective as the Service Manager for Don Snell Buick and a considerable safety risk to himself as well as to Don Snell Buick employees and customers.

17. As President of Don Snell Buick, mine was the final decision to terminate Mr. Dupuis' employment.

18. The decision to terminate Mr. Dupuis was a difficult one. He had been the Service Manager for Don Snell Buick for seventeen years, but I could no longer subject our customers and our employees to the environment his drinking created. Additionally, I had to consider the danger Mr. Dupuis posed to himself and others in drinking while working with automobiles.

19. I am thirteen years older than Mr. Dupuis. My birthdate is December 30, 1918. Mr. Dupuis' age was not a factor in my decision to terminate his (Mr. Dupuis') employment. I have never made any comments about Mr. Dupuis' age, and I have never heard any Don Snell Buick employee refer to Mr. Dupuis' age.

20. I bear no animosity toward Mr. Dupuis and wish him well in his future endeavors.

FURTHER AFFIANT SAYETH NOT.

/s/ Don Snell
DON SNELL

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of NOVEMBER, 1993.

[SEAL]

/s/ Susan R. Congleton
Notary Public in and for the State of Texas
Name (Print): /s/ Susan R. Congleton
My Commission Expires: 8-10-97

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PERCY DUPUIS	§	
vs.	§	CIVIL ACTION NO.
	§	
DON SNELL BUICK, INC.	§	3:93-CV-1220H

AFFIDAVIT OF JIM SNELL

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Jim Snell who, on oath after being duly sworn, deposes and states as follows:

1. My name is Jim Snell. I am over eighteen (18) years of age, and am competent to make this Affidavit. I have personal knowledge of all the facts recited herein and such facts are true and correct.

2. My birthdate is September 20, 1956.

3. I am currently employed as the General Manager of Don Snell Buick, Inc. ("Don Snell Buick"). I have held this position since 1987. Don Snell Buick is an automobile dealership that sells, leases and services automobiles.

4. I have been employed by Don Snell Buick since 1973.

5. Percy Dupuis has been employed as the Service Manager for Don Snell Buick since March 1975. Beginning in or around January 1989, Mr. Dupuis reported directly to me.

6. As Service Manager for Don Snell Buick, Mr. Dupuis was 100% responsible for the service department, including supervising the service department employees and the service and repair work they performed. He was responsible for maintaining customer contacts and good customer relations, test driving customer cars as well as new cars at the dealership, and for the administration of warranty between Buick Motor Division of General Motors Corp. ("Buick") and the dealership.

7. Twenty to thirty percent of the work performed by Don Snell Buick's service department is warranty work. Payment for warranty work can only be received from Buick and requires the approval of Buick's representative. Buick's representative in 1992 was Keith Black, district service manager. A vital function of Don Snell Buick's Service Manager's job was to maintain good relations with Buick's representative in the administration of warranty work.

8. Another requirement for Mr. Dupuis' position was that he maintain a good driving record and a valid driver's license.

9. During his years of employment, it became apparent that Mr. Dupuis had a problem with alcohol that increasingly affected his job performance. Customers as well as co-workers complained about Mr. Dupuis' drinking and his belligerent and abusive behavior. Don Snell

and I counselled [sic] Mr. Dupuis orally on various occasions without supporting written documentation of these warnings.

10. On May 3, 1989, Mr. Dupuis' drinking problem and the problems associated with it became so serious that Don Snell and I met with Mr. Dupuis and gave him the option of seeking treatment for his drinking problem or being terminated. A true and correct copy of the document memorializing this counseling session is attached hereto as Attachment 1.

11. Mr. Dupuis reluctantly agreed to seek treatment, and it was made clear that no further warnings would be issued if it was determined that he was drinking alcoholic beverages or intoxicated during working hours after the completion of such treatment. Mr. Dupuis was treated for his drinking problem at Charter Hospital.

12. Don Snell Buick continued to pay Mr. Dupuis his full salary during his treatment at Charter Hospital.

13. I met with the people at Charter concerning Mr. Dupuis and attended a counselling session with Mr. Dupuis to assist in his recovery.

14. On March 7, 1991, I suspected that Mr. Dupuis had been drinking during business hours because he was exhibiting slurred speech, trembling, and bloodshot eyes. I called him into my office and asked him if he had been drinking. Mr. Dupuis denied drinking. I reminded him at this time that, as had been explained to him in 1989, drinking during business hours was grounds for immediate termination, and he stated that he remembered and understood. A true and correct copy of the document

memorializing this meeting is attached hereto as Attachment 2.

15. On January 27, 1992, I was in the office but did not see Mr. Dupuis.

16. On January 31, 1992, Keith Black, a district service manager for Buick Motor Division of General Motors Corporation, came to my office to inform me of a series of incidents that had occurred on Monday, January 27, 1992. Mr. Black was in our offices that Monday to assist a customer in servicing her Buick. He informed me that when he brought the customer's car in Mr. Dupuis was abusive and appeared to be drunk. The details of these events are included in Keith Black's affidavit, a true and correct copy of which is attached to Defendant's Motion for Summary Judgment at Ex. B.

17. Due to the nature of his work, Mr. Black is a frequent visitor to Don Snell Buick, and since this was not the first unhappy experience Mr. Black had had with Mr. Dupuis, he wanted to arrange to deal with someone else on his future visits. His preference was to deal with Raney Young, Mr. Dupuis' assistant service manager.

18. After talking with Mr. Black, I asked Jim Bush, Don Snell Buick's office manager, if he had seen Mr. Dupuis on Monday, January 27, 1992. Mr. Bush did not recall seeing Mr. Dupuis on Monday but did recall that two employees, Betty Davis and Jeff Hamlin had told him that Mr. Dupuis was "blitzed" that day.

19. I then spoke with Ms. Davis and Mr. Hamlin and discussed in detail their observations of Mr. Dupuis on January 27, 1992. The affidavits of Ms. Davis and Mr.

Hamlin are attached to Defendant's Motion for Summary Judgment as Exs. F and G, respectively, and the statements made therein concerning their observations of Mr. Dupuis' behavior on January 27, 1992, accurately reflect the information that they reported to me.

20. On Saturday, February 1, 1992, I met with Don Snell to discuss the January 27, 1992 incidents reported by Keith Black and the results of my investigation into such allegations.

21. Don Snell and I decided that Mr. Dupuis was clearly in violation of the company's policies prohibiting (1) reporting to work under the influence of alcohol and (2) operating a company vehicle under the influence of alcohol. Mr. Dupuis' continual violations of such policies had rendered him ineffective as the Service Manager for Don Snell Buick and a considerable safety risk to himself as well as Don Snell Buick employees and customers.

22. As President of Don Snell Buick, the final decision to terminate Mr. Dupuis' employment was Don Snell's.

23. I called Mr. Dupuis into my office on Monday, February 3, 1992. I explained that it was evident that his drinking had continued and was adversely affecting his ability to perform his job. I further explained that, as a result of his continuing violation of company policies, I was forced to terminate him in the best interests of Don Snell Buick, its customers, and other employees.

24. The decision to terminate Mr. Dupuis was a difficult one. He had been with Don Snell Buick for seventeen years, but we could no longer subject our

customers and our employees to the environment his drinking created. Additionally, we had to consider the danger Mr. Dupuis posed to himself and others in drinking while working with automobiles.

25. Mr. Dupuis' age was not a factor in the decision to terminate his (Mr. Dupuis') employment. I have never made any comments about Mr. Dupuis' age, and I have never heard any Don Snell Buick employee refer to Mr. Dupuis' age.

26. I bear no animosity toward Mr. Dupuis and wish him well in his future endeavors.

FURTHER AFFIANT SAYETH NOT.

/s/ Jim Snell
JIM SNELL

SUBSCRIBED AND SWORN TO BEFORE ME this 16th day of NOVEMBER, 1993.

[SEAL]

/s/ Susan R. Congleton
Notary Public in and for the State of Texas
Name (Print): /s/ Susan R. Congleton
My Commission Expires: 8-10-97

No. 94-1133

Supreme Court, U.S.
FILED
JAN 30 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

PERCY DUPUIS,

Petitioner,

vs.

DON SNELL BUICK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Contrary to the issues stated by Dupuis in his Petition, the Fifth Circuit's opinion in this case is in no way inconsistent with the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993). Nor does this case turn on the question of a "pretext only" or "pretext-plus" interpretation of *St. Mary's*. Dupuis did not even create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination, much less produce evidence of discriminatory motive. Thus, by any standard and any interpretation of *St. Mary's*, Snell was entitled to summary judgment. The only appropriate question for review is:

> Whether the Fifth Circuit Court of Appeals erred in granting summary judgment in favor of Don Snell Buick, Inc. and holding that Plaintiff failed to introduce evidence sufficient to support a reasonable jury finding that Plaintiff was terminated because of his age?

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

A. Percy Dupuis, Petitioner

B. John E. Wall, Jr., Attorney for Petitioner

C. Don Snell Buick, Inc., Respondent

D. Jay C. Counts and Matt Holley, Littler, Mendelson, Fastiff & Tichy, Attorneys for Respondent.

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Statute Cited:

29 U.S.C. § 621 *et seq.* 1

Rule Cited:

Federal Rule of Civil Procedure 56 5

OPINIONS BELOW

Petitioner Percy Dupuis ("Dupuis" or "Petitioner") is a former employee of Respondent Don Snell Buick, Inc. ("Snell" or "Respondent"). Dupuis brought suit against Snell under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, alleging that he was terminated because of his age. The action was originally filed in state court, and removed by Snell to the United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3:93-CV-1220H. Thereafter, Snell moved for summary judgment.

By order dated January 31, 1994, United States District Judge Barefoot Sanders granted Snell's motion for summary judgment and dismissed Dupuis' claims. The district court found that: (1) Snell articulated a legitimate, nondiscriminatory reason for Dupuis' termination; (2) Dupuis failed to raise a genuine issue of material fact as to the truthfulness of Snell's articulated reason; and (3) Dupuis failed to raise a material issue of fact to support a finding that he was terminated because of his age (Pet. App. B).

On appeal to the Fifth Circuit Court of Appeals, No. 94-10200, Dupuis raised two issues: (1) whether the district court erred in holding that Snell satisfied its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination; and (2) whether the district court erred in holding that Dupuis failed to introduce evidence sufficient to support a finding that he was terminated because of his age. In affirming the decision of the district court, the Fifth Circuit held that Snell met its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination, and that Dupuis failed to produce evidence sufficient to support a finding that Snell's articulated reason was a pretext for unlawful age discrimination (Pet. App. A).

STATEMENT OF THE CASE

Snell is an automobile dealership that sells, leases and services automobiles. Dupuis was the service manager for Snell whose responsibilities included, among other things, supervision of service and repair work provided to customers and supervision of service department employees (Vol. 1, pp. 46, 51-52). Dupuis was terminated by Snell on February 3, 1993 as a result of his violation of company policies prohibiting being under the influence of alcohol at work and operating a company vehicle while under the influence of alcohol (Vol. 2, pp. 16, 55, 57, 82-83, 86). Dupuis' termination was not the result of a single incident, but was instead the culmination of Dupuis' repeated violations of Company policy regarding the use of alcohol over a period of many years. Dupuis' conduct continued despite repeated warnings and attempts by the Company to help Dupuis with his alcohol problem.

In July 1988, Don Snell, President of Snell, became suspicious that Dupuis was drinking on the job. Don Snell counselled Dupuis about drinking on the job and during lunch periods, as well as his concerns that Dupuis' drinking was a potential safety risk and could affect the service department's productivity. Don Snell provided Dupuis with specific instructions for the conduct of business that included an express prohibition against working under the influence of alcohol (Vol. 2, pp. 47, 50, 75, 105).

In May 1989, recognizing the seriousness of Dupuis' problem, Don Snell and his general manager, Jim Snell, met with Dupuis to discuss Dupuis' drinking problem as it affected his job performance and violated Company policy. During this meeting, Dupuis was given the option of seeking treatment for his drinking problem or being terminated from Snell's employment. Dupuis reluctantly agreed to seek treatment. Dupuis was told that any

repeated incident of drinking alcoholic beverages while at work or reporting to work under the influence of alcohol after the completion of his rehabilitation treatment would result in his immediate termination (Vol. 2, pp. 47-48, 52-53, 58, 76, 81).

Dupuis was hospitalized at Charter Hospital from May 10, 1989 to June 1989 for treatment of alcohol dependency. Dupuis' counselors recommended an extension of his treatment, which Dupuis declined (Vol. 2, pp. 20-24). Snell continued to pay Dupuis his full salary during his treatment at Charter Hospital (Vol. 2, p. 53).

Despite initial appearances that Dupuis had dealt effectively with his drinking problem, he had not done so. In October 1989, shortly after Dupuis' release from Charter Hospital, Dupuis was arrested and charged with felony retaliation against his wife (Vol. 2, p. 69). Dupuis' wife notified police that Dupuis was intoxicated and threatening her with violence (Vol. 2, p. 68). Mike McCarley, Snell's Body Shop Manager, went to the police station to obtain Dupuis' release from jail (Vol. 2, pp. 43-69).

In March 1991, Jim Snell again met with Dupuis upon suspicion that Dupuis was reporting to work under the influence of alcohol (Vol. 2, pp. 53, 59). Jim Snell was informed that Dupuis reported to work exhibiting slurred speech, tremors and bloodshot eyes. Jim Snell again reminded Dupuis that drinking during business hours was against Company policy and was grounds for immediate termination (Vol. 2, pp. 53, 59).

On January 31, 1992, Keith Black ("Black"), a District Service Manager for Buick Motor Division of General Motors Corporation and a frequent visitor to Snell Buick, informed Jim Snell that on January 27, 1992, Dupuis was abusive and appeared to be drunk. Black stated that this was not his first encounter with Dupuis in what appeared to be an intoxicated state, and he

preferred to deal with Raney Young, Dupuis' assistant, on his future visits (Vol. 2, pp. 15-16, 54). Jim Snell's investigation of the allegations revealed that many Company employees also witnessed Dupuis' intoxication on January 27th. The employees reported to Jim Snell that, on that date, (i) Dupuis' balance was so bad he had difficulty getting out of his car (the company car provided by Snell); (ii) Dupuis' eyes were bloodshot, his speech was slurred, and his attitude was belligerent; and (iii) Dupuis smelled strongly of alcohol. Dupuis was further observed going into his office, propping his feet on his desk, and falling asleep (Vol. 2, pp. 35, 38, 43, 54-55).[1]

A significant percentage of the work performed by Snell's service department (approximately 20%–30%) is warranty work. Since payment for such work can be received only from the Buick Motor Division upon the approval of its representative, it is critical that a professional and amicable relationship be maintained between Snell's service manager and the Buick Motor Division representative, in this instance, Keith Black. Black's inability to continue to work through Dupuis in administering the warranty work presented significant difficulties to Snell (Vol. 2, pp. 46, 52).

Don and Jim Snell met on Saturday, February 1, 1992, to determine the appropriate response to the overwhelming evidence of Dupuis' latest violations of Company policy. After considering the results of the investigation and Dupuis' history of violating the Company's policies relating to being under the influence of alcohol during working hours and while operating Company vehicles, Don and Jim Snell concluded that Dupuis'

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1. Snell's motion for summary judgment was supported by affidavits from numerous Snell employees stating that not only had they seen Dupuis intoxicated at work on many occasions but, more specifically, that Dupuis clearly appeared to be intoxicated at work on January 27, 1993.

continued violations of Company policy rendered him ineffective as a service manager and a considerable safety risk (Vol. 2, pp. 48, 55). Dupuis was terminated on February 3, 1992 (Vol. 2, pp. 55, 57, 86). As President of Snell, the final authority for the decision resided with Don Snell. Don Snell is thirteen (13) years older than Dupuis, and he has sworn that Dupuis' age was not a factor in the decision to terminate Dupuis' employment (Vol. 2, p. 49).

REASONS FOR DENYING THE WRIT

Summary

Dupuis seeks to invoke the extraordinary remedy of certiorari by arguing that the Fifth Circuit's opinion in this case is inconsistent with *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993), and by casting this as a significant case in a dispute among the circuits as to a "pretext only" or "pretext-plus" interpretation of *St. Mary's*. Neither is the case. Dupuis' position is based on the erroneous contention that he successfully established a material issue of fact as to the truthfulness of Snell's articulated reason, and the trial court thus granted summary judgment only because Dupuis could not go further and introduce additional direct evidence of discriminatory intent. That is simply not so. As the trial court and the Fifth Circuit properly held, Dupuis failed to create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination. Nor did Dupuis introduce evidence sufficient to support a finding that his age was a motivating factor in his termination. Thus, under any possible interpretation of *St. Mary's*, Snell is entitled to summary judgment.

In short, this case is not about "pretext only" versus "pretext-plus." This case is simply about whether Dupuis satisfied his burden under Fed. R. Civ. P. 56, as delineated by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548

(1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); and *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), of introducing evidence sufficient to support a reasonable jury finding that he was terminated because of his age. Dupuis failed to do so. Thus, the trial court properly granted summary judgment in favor of Snell.

I.

SNELL SATISFIED ITS BURDEN OF ARTICULATING A LEGITIMATE, NONDISCRIMINATORY REASON FOR DUPUIS' TERMINATION.

Dupuis argues that Snell did not meet its burden of articulating a legitimate, nondiscriminatory reason for Dupuis' termination because there is a material fact issue as to the *credibility* of Snell's articulated reason. Dupuis' position is not only unsupported by the summary judgment record,[2] but it is legally flawed. The defendant's burden once the plaintiff has established a *prima facie* case of age discrimination is merely one of production. The employer need not prove the legitimate, nondiscriminatory reason; instead, the employer need only produce evidence "which, *taken* as *true*, would *permit* the conclusion that there was a legitimate, nondiscriminatory reason for its adverse action." *St. Mary's Honor Center*, 113 S. Ct. at 2748. The Court may not assess the credibility of the articulated reason, because the burden of production necessarily *precedes* the credibility assessment stage. *Id.*

In this case, there can be no question that Snell met its burden

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2. Dupuis attempts to create a "credibility" issue by arguing that Snell has given inconsistent reasons for Dupuis' termination. As discussed at pages 7-8, *infra*, however, there is simply no such inconsistency.

of articulating a legitimate, nondiscriminatory reason for Dupuis' termination. As set forth in the affidavits of Don Snell and Jim Snell, Dupuis was terminated because of his violation of Company policy prohibiting (1) reporting to work under the influence of alcohol; and (2) operating a Company vehicle under the influence of alcohol.[3] Dupuis' argument is meritless.

II.

DUPUIS FAILED TO CREATE A MATERIAL ISSUE OF FACT AS TO THE TRUTHFULNESS OF SNELL'S ARTICULATED REASON.

As explained by both the district court and the Fifth Circuit, Dupuis failed to produce evidence sufficient to support a reasonable jury finding that Snell's articulated reason for his termination was untrue. Dupuis attempted to establish pretext by arguing that there were inconsistencies in Snell's stated reason for termination. The alleged inconsistencies identified by Dupuis are as follows:

1. Dupuis stated in his affidavit that at the time of his termination, Jim Snell told him that he was being terminated because he was "unwilling to stop drinking" and "was having a loss of productivity." (Vol. 1, p. 97);

2. At a hearing before the Texas Employment Commission in connection with Dupuis' claim for unemployment compensation benefits, Jim Snell stated that Dupuis was terminated for being "intoxicated" on the job (Vol. 1, p. 98);

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3. The affidavits of Don Snell and Jim Snell are attached to the Petition for Writ of Certiorari as Appendices E and F, respectively.

3. In their affidavits supporting summary judgment, Jim Snell and Don Snell stated that Dupuis was terminated for violating Company policy prohibiting reporting to work under the influence of alcohol and operating a Company vehicle under the influence of alcohol (Vol 2, pp. 48-54).

As the district court recognized, Dupuis' attempt to characterize the above as inconsistent reasons for his termination is "meritless" and "an act of desperation." (Vol 1, p. 161).

It is obvious from even Dupuis' account of the facts, that Snell has consistently maintained that Dupuis was terminated because of his violation of Company policy regarding the use of alcohol. The question on summary judgment was whether a reasonable factfinder could conclude that the reasons were conflicting. *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("The reason given by [defendant] to [plaintiff] may indicate that the explanation was not complete, but a reasonable factfinder could not conclude that the reasons are conflicting or that they show the reasons articulated by [defendant] are unworthy of credence."). *See also Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (minor inconsistencies in an employer's explanation for terminating an employee do not raise a material fact issue). The trial court and the Fifth Circuit correctly found that a reasonable jury could not conclude that the reasons were conflicting.

Further, Dupuis' attempt to create a material issue of fact by submitting an affidavit denying that he was intoxicated on January 27, 1992 completely misses the mark. The mere existence of *some* disputed fact between the parties is insufficient to avoid summary judgment. Rather, the dispute must involve a *material* fact, *i.e.*, one which would support a reasonable jury finding in favor of the nonmovant. *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). The issue before the trial court was Snell's *motivation* for Dupuis' termination, not whether Dupuis was in fact intoxicated on January 27, 1992. *See Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991) ("the existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference that the defendant was not truly motivated by its proffered justification"). *See also Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988) (the ADEA does not protect employees from erroneous or even arbitrary decisions, but only from decisions that are unlawfully motivated).

Dupuis did not dispute that he had been at work under the influence of alcohol on many occasions prior to January 27, 1992, and that Snell had counseled and warned him that this was grounds for immediate termination. Nor is it disputed that Don and Jim Snell received reports from Keith Black and many other Snell employees that Dupuis was under the influence of alcohol on January 27, 1992. Thus, Dupuis did not call into question Jim and Don Snell's *belief* that he was intoxicated on January 27, 1992, and that their decision to terminate him was motivated by that belief. Accordingly, the trial court properly granted summary judgment in favor of Snell.

III.

DUPUIS FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT HE WAS TERMINATED BECAUSE OF HIS AGE.

The ultimate burden of proving unlawful age discrimination rests at all times with the plaintiff. *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2747 (1993). Thus, in summary judgment proceedings, the ultimate question for the court is whether there is sufficient evidence in the record to permit a reasonable fact finder to conclude that the plaintiff was terminated because of his age. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 106 S. Ct. 1348, 1356 (1986). Dupuis produced no such evidence in this case.

The only "evidence" offered by Dupuis in an effort to show age bias were statements in his affidavit that (1) his replacement was paid less; and (2) he overheard an unidentified Snell employee say that Snell wanted to get someone younger to manage the service department (Vol. 1, pp. 97-98). Neither of these statements is sufficient to create a material issue of fact.

A. A mere salary discrepancy will not support a finding of unlawful age discrimination.

The mere fact of a salary discrepancy between Dupuis and his younger, less experienced replacement is insufficient to create a material issue of fact. A difference in salary simply does not equate to age discrimination, and Dupuis produced no evidence that salary considerations were even a factor in the decision to terminate his employment. Instead, in his affidavit, Dupuis simply stated in conclusory fashion that "[his replacement] was paid on a different pay scale that [sic] I was and

his percentage on his commissions were less." (Vol. 1., p. 98). As the district court correctly pointed out:

> The mere existence of the difference in salary is insufficient to raise a material issue of fact. Were the Court to hold otherwise, every frivolous or insubstantial claimant could defeat summary judgment by submitting his or her pay stub to the Court.

(Pet. App. B).

B. An alleged isolated remark by a non-decisionmaker is insufficient to create a material issue of fact.

Likewise, Dupuis' allegation that an unidentified Snell employee stated that the Company wanted to get someone younger for his position is insufficient to create a material issue of fact. Dupuis concedes that he cannot identify who made the alleged remark. More importantly, it is undisputed that the remark was not made by either Don or Jim Snell — the individuals who made the decision to terminate Dupuis' employment.[4] Dupuis' affidavit testimony on this issue is inadmissible hearsay which may not be considered by the court in summary judgment proceedings. *Martin v. John W. Stone*

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4. Dupuis stated in his affidavit that not only could he not identify who made the statement, but he could not even positively identify who was present during the conversation at which the remark was allegedly made. Instead, Dupuis merely stated that the following individuals were "possibly" present in the department at that time: Anthony Ashley, Johnny Kroseski, Carl Contreras, Jeff Hamlin, David Herring, Mike McCarley and Mike Taylor (Vol. 2, p. 91). Snell introduced affidavits from each of these individuals denying that they made any age-biased remarks (Vol. 2, pp. 13, 31, 33, 41, 44, 61). Even if Petitioner's allegation is accepted as true, however, it is insufficient to create a material issue of fact.

Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987); *Garside v. OSCO Drug, Inc.*, 895 F.2d 46, 50 (5th Cir. 1990). At any rate, even accepting Dupuis' statement as true, an isolated remark such as this by a non-decisionmaker is insufficient to create a material issue of fact to avoid summary judgment. *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Turner v. North America Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Guthrie v. Tifco Industries*, 941 F.2d 374, 378-79 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1267 (1992); *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541 (8th Cir. 1991); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990).

CONCLUSION

This is not, as Petitioner would have the Court believe, a significant case with respect to the issue of whether *St. Mary's Honor Center v. Hicks* requires a showing of "pretext only" or "pretext-plus." To the contrary, that question is not even necessary to the resolution of this case. By any standard, Dupuis did not satisfy his burden as a non-movant seeking to avoid summary judgment as established by the Supreme Court's *Celotex-Anderson-Matsushita* trilogy. Dupuis did not introduce evidence sufficient to create a material issue of fact as to the truthfulness of Snell's articulated reason for Dupuis' termination, much less evidence of discriminatory motive. Simply put, Dupuis failed to introduce evidence sufficient to support a reasonable jury finding that he was terminated because of his age. The district court properly granted summary judgment in favor of Snell.

Based on the foregoing arguments and authorities, Dupuis' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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